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TREATISE

ON THE

LEGAL REMEDIES

OF

MANDAMUS AND PROHIBITION,

HABEAS CORPUS, CERTIORARI

AND

QUO WARRANTO,

BY

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PREFACE.

In this volume the author has sought to deliniate the principles governing the courts in administering relief by the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari and Quo Warranto. In the prosecution of this object, his labors have covered a field which has hitherto been but partially explored. It has been his aim to set forth the results of the most reliable English and American Decisions on the several subjects treated upon which have been gathered in many months of careful study and research of the cases which are referred to, under the different heads.

In cases where the former New York Code is referred to the corresponding sections of the New Code are given. Where no reference to the New Code is given, it may be understood that the present Code makes no changes in the sections referred to in the old.

ALBANY, N. Y., *April* 20, 1880.

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CHAPTER I.

MANDAMUS AND PROHIBITION.

Mandamus.

General observations.

The writ of mandamus is a high prerogative writ, issued in the name of the people, by the Supreme Court, and directed to any person, corporation or inferior jurisdiction, within the state, requiring the doing of some particular thing therein specified, which pertains to the office or duty of such person, corporation or inferior jurisdiction, and which such court has previously determined, or at least supposed, to be consonant to right and justice.[1] This writ is issued or withheld in the discretion of the court, and the court, in issuing it, will be governed by what seems to be necessary and proper to be done in the premises, for the purposes of justice.[2]

It will not be issued in cases of *doubtful* right. The legal right of the party to that which he de-

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[1] See 3 Bl. Com., 110; 12 Wheat., 561; 2 Johns. Cas., 217, 2d ed., note. But the exercise of a discretionary power may be compelled. 13 Barb., 206.

[2] 4 Hill, 583; 15 Barb., 607.

mands in the writ must be clearly established,[1] and to entitle a party to this writ, it must appear that there is no other specific *legal remedy* to which he can resort for the enforcement of his right. Where the party has an adequate remedy by action, this writ will not be awarded,[2] and it is granted only for *public* purposes to compel the performance of *public* duties,[3] and there must have been a neglect or a refusal to perform such duties, after a demand had been made for their performance.[4]

It will not be issued where it would be unavailing. Thus, it is held that a mandamus should not be granted where it would be unavailing from a want of power in the defendants; for the court should refuse the writ if it be manifest that it would be vain and fruitless. Thus, a mandamus to compel a board of canvassers to do certain acts, after they have ceased to exist as a board, would be futile.[5] The Supreme Court may interfere to control the action of a board of canvassers while they exist as a board; but it can be done only while such board has a legal existence.[5]

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[1] 11 N. Y., 563; 13 Barb., 444; 8 Pet., 291; 11 How. U. S. R., 272.

[2] 10 How., 544; 6 Hill, 243; 25 Wend., 680; 11 N.Y., 563.

[3] 2 Johns. Cas., 217, note; 3 Bl. Com., 110.

[4] 7 Lond. Jur., 233.

[5] 12 Barb., 217; 11 How., 89; 15 Barb., 607.

And where a mandamus is asked, it should appear that the defendants have it yet in their power to perform the duty required of them.[1] Thus, a mandamus should not be issued to direct commissioners of excise to entertain the application of the petitioner after the board had met and completed the ten days limited in the act.[2]

This writ lies to compel the performance of ministerial acts, and is also addressed to subordinate judicial tribunals, requiring them to exercise their judicial functions by rendering some judgment in cases legally before them, where there would be a failure of justice from a delay or refusal to act. But there is this difference; with respect to judicial tribunals, they will require them to act, in giving judgment, &c., without assuming to determine what that action shall be, or to control such action; but in respect to ministerial action, it specifies the particular act to be done.[3]

Although a mandamus does not lie to *control* a discretionary power, yet it will compel the *exercise* of such power in cases where it legally exists, as, where an officer is invested with power, and is required to

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[1] *Supra*, and 16 Barb., 52.

[2] 7 Abb., 34.

[3] 3 Dall., 42; 13 Peters, 279, 404; 7 Dowl. & Ryl., 334; 5 Halst., 57; 7 Id., 179.

grant a license to the applicant, on his complying with certain conditions, to be determined by said officer, and the applicant has complied with the necessary conditions, but the officer refuses to grant the license, upon the ground that he has concluded to grant no licenses; in such case a mandamus will lie.[1]

In general, the Supreme Court should not interfere by mandamus, with that portion of the practice of inferior courts, which does not depend upon established principles or is not regulated by fixed rules.[2]

Against whom, and when the writ will lie.

The writ, in proper cases, will lie against inferior courts, corporations and ministerial officers.

Against inferior courts.

This writ lies to set an *inferior court* in motion, where it refuses to act; but it will not require that court to come to any particular decision, or to retrace its steps where it has acted.[3] Nor will it be granted where the court has acted judicially in making its decision, for the purpose of reviewing or correcting

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[1] 13 Barb., 206; 1 Hill, 655; 19 Johns., 259; 12 Id., 414; 6 How., 81.

[2] 15 How., 385; 2 Id., 59; 5 Wend., 114.

[3] 2 Denio, 192; 18 Wend., 79; 13 How., 277; 20 Wend., 658; 1 Halst., 157; 5 Id., 57; 2 Bibb., 573.

such decision,[1] not even for the purpose of enabling the party applying to bring error.[2] The writ of mandamus cannot be awarded for the correction of *judicial errors.*[3] Nor has the court jurisdiction, by mandamus, to review the decisions of a subordinate court in a matter of which such subordinate court had judical cognizance.[4]

When the writ is directed to judicial officers, its mandate is that they proceed — adjudicate — exercise a discretion upon a particular subject. It will direct the judge or court *to proceed to render judgment, but will not direct what judgment shall be rendered.*[5] Thus the court, by mandamus, will require a subordinate court to settle a case after the denial of a motion to set aside the report of a referee, so as to enable the party to bring error; but it will not direct *what facts shall be inserted in the case.*[6] So the Supreme Court will require an inferior court to proceed in the exercise of its judicial discretion, but it will not attempt to control that discretion.[7]

As this writ will not lie to control or direct the

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[1] Idem; 20 Wend., 658.

[2] 2 Denio, 191.

[3] Per BRONSON, Ch. J., 20 Wend., 659.

[4] 18 Wend., 79; 10 Pick., 244; 13 Pet., 279, 404.

[5] 20 Pick., 484; 13 Pet., 279, 404; 7 Dowl. & Ryl. 334.

[6] 20 Wend., 663.

[7] 19 Johns., 260; 18 Wend., 92; 12 Barb., 446.

discretion of the court, it will not be allowed to compel a subordinate court to grant a new trial upon the merits;[1] nor to vacate a rule granting an amendment in any case within the power of the court;[2] nor to vacate a rule setting aside a regular default and permitting the defendant to plead, on payment of costs;[3] nor, generally, will it be granted for the purpose of controlling the practice in other courts.[4]

But this writ will be granted for the purpose of compelling an inferior court to do some act belonging to its duty. Thus, it will compel an inferior court to to give judgment, in order that an appeal may be brought;[5] or will compel a justice of the peace to issue an execution upon a judgment rendered by him;[6] or a court of sessions to enter judgment on a verdict where the court had no power to grant a new trial;[7] or to settle a case after denial of a motion to set aside the report of a referee, so as to enable the party to appeal.[8]

This writ will not be granted to be directed to a court acting under a special commission, which had

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[1] 2 Cow., 479.
[2] 16 Wend., 617; 20 Id., 658.
[3] 6 Cow., 392.
[4] 16 How., 200; 15 Id., 392.
[5] 2 Johns. Cas., 215.
[6] 2 How., 109.
[7] 1 Johns. Cas., 179.
[8] 20 Wend., 663.

expired by its own limitation prior to the application for the writ.[1]

A mandamus will not lie to the Common Pleas, to correct the taxation of a bill of costs in items dependent, in a measure, upon discretion; thus, how many folios should be disregarded as unnecessary;[2] nor will it lie to review the determination of a question of fact on the weight of evidence, as an order setting aside the report of referees.[3]

Against corporations.

This writ also lies against corporations, to compel them to perform the duties which the law imposes upon them. But it lies only in those cases where the party has not an adequate remedy by action;[4] as, where a corporation improperly refuses to transfer stock; the party has an ample, though not a specific, remedy by action, and for that reason a mandamus will not lie.[5] Nor will it lie against a municipal corporation to compel it to file and confirm an assessment of damages for the laying out of a street. If the relator's rights are vested, he should sue in assumpsit

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[1] 10 Wend., 108.
[2] 19 Wend., 113.
[3] 19 Wend., 68.
[4] 2 Cow., 444; 1 Wend, 318.
[5] Per BRONSON, Ch. J., 6 Hill, 243; 20 Wend., 91; 22 Wend., 348; 10 Johns.; 484.

for the money, or in case, for the refusal to proceed.[1] The general rule applicable in these cases is, that a mandamus will lie only to enforce a clear legal right, where a remedy at law is either wanting or doubtful.[2]

Although it is a general rule that a mandamus will not be granted where the applicant has a legal remedy, but in cases of corporations and ministerial officers, they may perhaps be compelled by mandamus to exercise their functions according to law, notwithstanding they may be liable to an action for refusal.[3]

Against officers.

Where subordinate public agents refuse to act, or entertain a question for their discretion in cases where the law enjoins them to do the act required by law, the court may enforce obedience to the law by mandamus, where no other remedy exists.[4] As, where the supervisors of a county refuse to allow a claim, on the ground that it is not a county charge, when by law it is such charge, a mandamus lies to compel them to admit it as such, and to exercise their discretion as to the amount to be allowed.[5] But if their

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[1] 1 Wend., 318.

[2] 2 N. Y., 490; 11 N. Y., 563; 5 Metc., 73; 25 Barb., 73.

[3] 23 Wend., 448; 2 Barb., 397; but see 11 N. Y., 563.

[4] 6 How., 81; 19 Johns., 259; 1 Cow., 417.

[5] 19 Johns., 259; 1 Hill, 50.

discretion extended to allowing or rejecting the claim, a mandamus would not lie to compel such allowance.[1]

As against corporations and ministerial officers, a mandamus may be granted not only requiring them to proceed in the discharge of their duty, but also directing the manner in which they shall act, and, specifically, what they shall do.[2] Thus a writ has been allowed to compel supervisors of a county to allow the expenses of a county clerk incurred by him according to law.[3] So, also, to compel them to restore the names of certain banks which have been stricken from the assessment roll as made by the assessors.[4] Also, to issue warrants for the military commutation; and, being neglected at their annual meeting, they have been compelled to meet again and perform that duty.[5]

Mandamus is also the appropriate remedy by which the supervisors are compelled to levy and collect money which, by statute, is made a county charge;[6] or to levy and collect the amount of damages sustained by the owners of land taken for the improvement of a public highway.[7] But it will not lie to

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[1] 25 Wend., 692.

[2] See 20 Wend., 658; 19 Johns., 263; 13 How., 277.

[3] 18 Johns., 242; 1 How., 163.

[4] 4 Hill, 20.

[5] 8. N. Y., 318.

[6] 10 Wend., 363.

[7] 4 Barb., 64.

compel them to allow the compensation of a district attorney for his services on *certiorari* in a criminal case, which has been certified by a justice of the peace. Because, if they have a discretion as to its allowance, it cannot be controlled; if not, that is if the certificate is conclusive, the remedy is by action.[1] Mandamus is also the proper remedy to compel the board of supervisors of the city and county of New York to reduce a tax imposed on the real property of the plaintiff, on the ground that the valuation of the land was too high. The rule laid down is, that where a specific duty is imposed on the supervisors, or any other public officer, by statute, and they do not conform to the statute, and the omission to conform affects a particular party only, and not the whole assessment list, a mandamus will issue to compel such officers, &c.[2]

Commissioners of highways may be compelled by mandamus to discharge their duties.[3] But a mandamus should not be resorted to to compel them to open a highway when its necessary effect would be to subject them to an action of trespass.[4]

So a mandamus lies to compel the supervisors and

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[1] 14 Barb., 52.

[2] 12 How., 224; 19 Johns., 259; 1 Hill, 362; 4 Paige, 399; 10 Wend., 393; 18 Id., 659.

[3] 19 Wend., 56; 1 Cow., 23.

[4] 27 Barb., 94; 3 Hill, 458.

overseers of the poor of towns, created by a division of a former town, to make an apportionment of the expenses of paupers, who were omitted by them in the division of paupers, unless they had acted on the case, and adjudged the persons in question, not to be paupers.[1] So a mandamus was granted where a judge of the County Court omitted to file his decision in a case for more than twenty days after the court at which the trial took place.[2] So it is the proper remedy to compel the proper officer to administer the oath of office to a party entitled to enter upon an office.[3] It is the appropriate remedy to compel a county treasurer to pay, when he refuses to pay a demand, legally audited and allowed by the board of supervisors and directed to be paid.[4] But it will not be awarded to compel him to pay a demand, not a legal charge against the county, although it has been allowed by the supervisors.[5]

This writ is allowable whenever a party has a legal right, and is entitled to a specific remedy to enforce it, and a public officer whose duty it is to afford that remedy, refuses to afford it. Thus it will lie to compel the clerk of an inferior court to issue an exe-

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[1] 2 Cow., 485.

[2] See Code, § 267; § 1228, new Code; 5 How., 47.

[3] 4 Abb., 35; 3 Hill, 42.

[4] 19 Barb., 468.

[5] 23 Barb., 340; see 6 Hill, 244.

cution on a judgment which an Appellate Court, without jurisdiction, assumed to reverse.[1] But when the question is one of irregularity and not of jurisdiction, the irregularity will be waived by arguing the appeal on its merits, and a mandamus will not lie.[2]

A mandamus will also be awarded to compel the attorney-general to give a certificate, that a suit was duly instituted as required by law, when such certificate is necessary in order to collect costs against the state[3] The performance of an official duty, not limited in respect to the particular person holding the office, or the time of performance, may be enforced by mandamus, notwithstanding the term of office is about to expire.[4] And the mandamus may be awarded requiring the sheriff to execute a deed, even where he has already executed one to a third person, who has conveyed the premises to a *bona fide* purchaser.[5] The sheriff must do his duty, although the act be inconsistent with what he had previously done.[5]

This writ is sometimes resorted to for the purpose of restoring an individual to an office, where he has been illegally deprived of the possession thereof.[6] But the court will not grant a mandamus to admit a

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[1] 3 Abb., 309; 13 How., 260; 2 How., 109.
[2] 16 How., 199.
[3] 17 How., 10.
[4] 19 Wend., 56.
[5] 2 N. Y., 484.
[6] 2 Johns. Cas., 217.

person to an office, where the office is already filled by another person, who has been admitted and sworn and is in by color of right.[1] Says Justice S. B. STRONG: 1. "A mandamus is inappropriate where there is a real and substantial dispute as to the title to an office; 2. Where the right of the applicant is clear and unquestionable, and the possession of the books and papers is all that is necessary to enable him to perform fully and satisfactorily the duties of the office, a resort to the summary process of the court given by statute to obtain such books, &c., renders a mandamus unnecessary. But when the title to the office is indisputable, and the objection thereto is wholly frivolous, and the books and papers would not give him the entire control of the office, the remedy by the proceedings substituted by the Code for the writ of *quo warranto*, would, in many cases, be so dilatory as to amount to a failure of justice; and that in such cases a mandamus would be proper and should be awarded."[2]

Against private persons and officers of corporations.

When a director of a bank is deprived of his right to inspect the books of the bank, he may have a mandamus to enforce his right,[3] and the writ may be di-

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[1] 3 Johns. Cas., 79; 20 Barb., 302.

[2] 7 How., 128.

[3] 12 Wend., 183.

rected to the cashier, he having charge of the books. So the secretary of a turnpike corporation may be compelled by mandamus to allow the relator, or a director of the company to examine the books of the corporation.[1]

When there is a right to execute an office, perform a service, or exercise a franchise, and especially if it be a public concern, and attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court ought to assist by mandamus[2] Thus, a mandamus lies to compel trustees of a religious corporation to induct a pastor, regularly appointed by the proper ecclesiastical authority.[3] So, also, to compel a medical society to restore a party to membership when he had been illegally expelled.[4]

The writ of mandamus and the proceedings thereon.

The proceeding will be for a peremptory mandamus, an alternative mandamus, or an order to show cause, which is in the nature of an alternative mandamus. A peremptory mandamus is seldom granted in the first instance, unless both parties have been heard upon the application therefor, and there exists no dis-

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[1] 1 How., 247.
[2] 7 How., 124; 3 Barb., 397.
[3] Idem; 3 Burr., 1265.
[4] 24 Barb., 570.

pute about the facts, the law being with the applicant.[1] If it be apparent to the court that no excuse can be given for the non-performance of the act, and the rights of the party may be endangered by delay, a peremptory mandamus will be granted.[2] So it is directed by the statutes[3] to be granted, where a verdict on an issue of fact is found for the relator, or where judgment upon demurrer or on default, is rendered in his favor.[4]

Where the facts, on which the applicant relies, are in dispute, an alternative mandamus issues. The alternative mandamus brings the questions to be decided, before the court, by a statement of the facts upon which the application for relief is founded, and the return of the defendant made upon such writ, either, admitting, or denying such statement, or confessing and avoiding the same.

The usual practice is to grant an order to show cause instead of issuing an alternative mandamus, especially when the application is to compel the performance of an act by a subordinate court.[5] In such case the questions arising upon the application are discussed upon affidavits, and no formal judgment is given. Formerly the only practical difference between the proceeding upon an order to show cause, and an

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[1] See 7 Cow., 526.

[2] 14 Johns., 325.

[3] 2 R. S., 587, § 57.

[4] See 3 How., 380.

[5] See 10 Wend., 30; 9 Id., 472; 2 Johns. Cas., 68.

alternative mandamus, was, that in the former case the decision of the court was final; while in the latter case the decision might be reviewed.[1] But as the law now stands, either party may appeal from the decision of the court made at special term on an order to show cause.[2] Substantially the same end was accomplished under the former practice on an order to show cause; for the court on application of either party, permitted the alternative mandamus to issue, and a formal record to be made up, on which the party desiring might have the case reviewed.[3]

But generally, whether the proceeding is by obtaining in the first instance an alternative writ, or a rule to show cause, the defendant should in every instance, before a peremptory mandamus is awarded against him, have the usual time allowed upon other motions, to present his defense. No motion, which in its operation is to have the effect of a final judgment, ought to be granted without giving the party against whom it is made an opportunity of being heard.[4]

The application for the writ—affidavit.

The application for the writ of mandamus is based

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[1] 3 How., 165; 10 Wend., 30.

[2] 5 N. Y. S. at L., 133; 4 Id., 681.

[3] 12 Wend., 183; 10 Id., 31; 20 Barb., 86.

[4] 3 How., 164; 15 Johns., 537.

upon affidavits, stating the facts upon which the applicant relies for relief, and showing that he is entitled thereto,[1] and where the matter relates to private or corporate rights, such facts should also be stated as to to show the title of the relator, otherwise a stranger might obtain a mandamus officiously, and for purposes not desirable to the real party.[2] Thus, an affidavit for an order to show cause, why a mandamus should not issue to compel a court to restore an attorney to his office, should show that the court below acted improperly, or that the charge against the attorney was founded in error.[3] The facts should be set forth with precision, so that an indictment for perjury could be maintained upon them if false,[4] and they should anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim.[5] Thus it should show a default on the part of the court, corporation or individual proceeded against, as, that the applicant had applied to the defendant to do the thing which he requires the court to command him to perform, and that there was a refusal or neglect on his part to do

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[1] 1 Johns. Cas., 134.

[2] 19 Wend., 56; 1 How., 186.

[3] 1 Johns. Cas., 134; 3 Term R., 575.

[4] 5 Term R., 466.

[5] See 2 Johns. Cas., 217, 63, note.

the same.[1] It should show that the applicant had complied with everything necessary to constitute his right,[2] and entitle him to the relief he prays.[3]

In an affidavit, as a foundation for a mandamus to compel an admission or restoration to an office, the nature of the office, its duties and other facts to show that it is of a public nature, should be stated;[4] and where it is by charter, the substance, as applicable, should be stated therein.[5] So likewise, the election and other circumstances, under which the applicant claimed and still claims to be admitted, must be distinctly stated, and shown to have been according to the charter, &c.[5] A deficiency in the affidavit of the applicant is sometimes cured by statements in the affidavit of the defendant; for the court will grant the writ whenever the proper case is made out.[6]

It is held that the affidavit should not be entitled in the court where the application is made, and the reason assigned is, that there is no cause pending of which it could be entitled; and an indictment for perjury in making such an affidavit must fail, as it could not be shown that such a cause existed in the

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[1] 1 Term R., 403; 2 Id., 334.
[2] Bull. N. P., 201.
[3] East., 345; 2 N. Y., 490.
[4] 1 Chit. Gen. Pr., 808.
[5] Bull. N. P., 200.
[6] 3 Term R., 596; 3 Steph. N. P., 2319; 2 Johns. Cas., 217, note 63.

court in which the affidavit was made.[1] But if the entitling be such only as is fairly descriptive of the case, it will not come within such rule.[2]

The application for the writ is made to the Supreme Court at special term,[2] and should be heard at special term.[3] But after the defendants have made and filed a return to an alternative mandamus, it will be too late for them to object to the form of the writ, or that it is not made returnable at special term.[4]

This application may be made *ex parte*, but the relator may (and in many cases it is the better practice), instead of applying for an order to show cause, or making an *ex parte* application for an alternative writ, to give the ordinary notice of motion, upon the affidavits, that a writ of mandamus will be applied for when the motion comes on to be heard; if material facts appear to be in dispute between the parties, an alternative writ may be allowed, which will lead to the forming of an issue to be tried by jury, as will be hereafter shown; if there is no material fact in dispute, the court can at once grant or deny the peremptory writ, thus at once disposing of the questions of law, and making an order thereon that can be reviewed in the general term and Court of Appeals.

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[1] 1 Wend., 291, per SAVAGE, J.

[2] See 6 Cow, 61.

[3] Supreme Court, Rule 40, 1858; 12 Barb., 219.

[4] 11 How., 89.

Order granting writ. If the court decides to allow the writ, an order granting it should be prepared and entered in the county where the proceeding is instituted. The order should set forth substantially what the writ allowed may command the defendants to do.

The alternative mandamus.

The alternative mandamus is issued in the name of the people of the state of New York, and is directed to the one who, by law, is obliged to execute it, or do the thing required to be done. It recites briefly the facts which precede the injury complained of, and upon which it is based; it then states the proceeding complained of, as stated in the complaint of the relator; it then proceeds to order or command the defendant that he act in the premises, or that he do the particular thing required to be done, substantially according to the order of the court allowing the issuing of the writ, or that he show cause to the contrary thereof, before the Supreme Court at the next special term thereof, to be holden, &c., and also that he return in what manner he execute the writ, &c.

This writ is in the nature of a declaration, and must state a good title in substance.[1] The relator is bound to set forth therein sufficient facts to entitle him to the relief he claims.[2] The reason is, that if

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[1] 2 N. Y., 490. [2] 10 Wend., 25.

the material facts on which the relator founds his claim are not stated in the writ, the defendant is deprived of the power of traversing them, for he can only traverse what is stated in the writ.[1] But the most cogent reason is, the process is considered as a declaration, and the relator, the actual plaintiff; and the familiar rule that he must succeed, if at all, upon the strength of his own allegation, is applicable. Thus, where the controversy arises upon a demurrer to the defendant's return, it is competent for the defendant to avail himself of any material objection to the writ, agreeably to the established rule, that the party committing the first error in substance, in pleading, must fail on a general demurrer.[2]

Thus, where the relator sets forth in the alternative mandamus, that he has acquired the rights of the original purchaser at sheriff sale, first as assignee, and, secondly, as a subsequent judgment creditor, it will be a fatal objection to his claim as assignee, that he has not filed the assignment to him, in the office of the clerk of the county in which the real estate sold is situated.[3] So, also, where he claims in the character of a redeeming judgment creditor, it must appear that he has presented to, and left with, such purchaser or

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[1] 3 Barn. & Ald., 221.

[2] 2 N. Y., 492, per STRONG, J.

[3] 2 R. S., 373, § 60; 2 N. Y. S. at L. 387, § 60; 2 N. Y., 492.

officer who made the sale, a copy of the docket of his judgment, a copy of the assignment of it, if any, duly verified, and an affidavit of the amount due at the time, &c. Without this, he had no right to acquire the title of the original purchaser.[1]

The title of the relator must be clearly and distinctly stated in the alternative mandamus, so that the facts stated may be admitted or traversed. It is not enough to refer in the writ to the affidavits and other papers on file, in which the order for the mandamus was made, although such reference may be made to show the *amount* of the money claimed, but not the *right* of the relator thereto.[2]

Where the writ enjoins the performance of a duty, it should set out the duty to be performed,[3] although it need not set out by what authority the duty exists.[4] So, in commanding a person to undertake an office, it is sufficient to show the *general liability* of the defendant to serve, and to allege that he was elected, and, without reasonable cause, refused to undertake the office; but it need not be averred that he was *able* and *fit* to serve.[5]

If the object of the writ is the production of records,

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[1] Idem, § 60; 2 N. Y., 493.

[2] 7 Term R., 52; 7 East., 345; 25 Wend., 32; 10 Wend., 25; 15 Barb., 607.

[3] Per LEE, Ch. J., Sayre, 37.

[4] Str., 897.

[5] 2 Lev., 200.

a general description thereof will be sufficient.[1] And so, an alternative mandamus to a court of Common Pleas, commanding it to seal a bill of exceptions, need not set forth such bill; it may be served by copy, at the same time showing the original.[2]

This writ is tested, signed and sealed in the usual manner, although not a process within the meaning of the statute regulating the test and return of process.[3]

To whom directed.

The writ must be directed to the one whose legal duty requires him to execute it, or do the thing required to be done. If the direction of the writ include any who are not authorized to act in the premises, it will be bad; as, where it was directed to the mayor and clerk of Hereford, when in fact the mayor only was authorized to act.[4] And for a similar reason, the same writ of mandamus cannot be directed to the township committees of two several townships, to compel them to proceed to do their duty in a matter of a road.[5]

Where the mandamus was sued out to commission-

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[1] 1 Lid., 31; 3 Steph. N. P., 2321, 2322.

[2] 4 Cow., 73.

[3] 2 R. S., 197, § 5; 13 Wend., 649, 655, note; 3 How., 164.

[4] 2 Salk., 699, 701; 2 M. & S., 598; 5 Abb., 241.

[5] 5 Halst., 292.

ers of highways, to require them to act as such commissioners, it was held, that in the first instance, it need not be directed to them by their individual names, it being only in case of disobedience to the writ, they were liable to be proceeded against individually.[1]

Where the writ is directed to a corporation or a select body, it must be directed to them in their proper name and also in their proper capacity, and the application should state in what capacity it is intended the writ should be directed to them.[2] Thus, the direction of a writ to the members of a town council, should be by their corporate name, for that is their legal description as long as they continue to have a corporate existence.[3]

How served.

The alternative mandamus may be served by showing the original and delivering a copy,[4] and the party to whom it is directed must make his return without the writ.[5] It should be served at least eight days before the time for showing cause specified in the writ,[6] and may be served either in term time or vaca-

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[1] 16 Johns., 61.

[2] 2 Johns. Cas., 217, 65 note; 3 Barn. & Cres., 685.

[3] 2 M. & S., 598; 1 Ld. Raym., 559.

[4] 1 Johns., 64.

[5] 4 Cow., 73.

[6] 3 How., 164.

tion,[1] unless it be an application to compel an inferior court to try a cause, when the service should be in term time.[2]

When it may be amended.

The writ being in the nature of a declaration, it may be amended at any time before it is returnable.[3] But amendments will not be allowed after the return, especially where the return has been traversed.[4] The statute, however, provides that the court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or in substance, for the furtherance of justice,[5] and this provision is made applicable to all writs of mandamus and prohibition.[6]

Motion to quash or set aside the writ.

The defendant, in analogy to the old practice in actions at law, after the service of the alternative writ, may appear and move the court to quash or set the same aside.[7] This motion is in the nature of a demurrer,[8] and should be made before the return to the writ, unless the motion to quash is based upon a

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[1] 4 Cow., 73; 1 Johns., 64.
[2] 1 How., 114.
[3] 6 Mod., 183.
[4] 4 Term R., 689; 5 Abb., 241.
[5] 2 R. S., 424, § 1.
[6] Idem, § 10.
[7] 4 Cow., 73.
[8] 7 How., 290.

defect in substance, in which case it may be taken advantage of at any time before the peremptory mandamus is awarded.[1] This is further in analogy with the old practice; where the motion to quash or set aside is for some *formal* or *technical* defect in the writ, it is in the nature of a special demurrer, and must be taken advantage of before pleading to the action; and where the motion is based upon some defect in substance, it is in the nature of a general demurrer; and such defect might be taken advantage of at any time before judgment, &c.

Where the defendant desires further time to make his return, he must apply to the supreme court or to a justice thereof for an order enlarging the time.[2] This the court has power to grant, the same as in personal actions. It is merely asking for further time to answer the complaint or writ.

If the defendants fail to make a return according to the command of the writ, the statute provides[3] that they shall be proceeded against as provided in the act regulating proceedings, as for contempts to enforce civil remedies.[4] This branch of the proceeding differs

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[1] 10 Wend., 31; 2 N. Y., 492; 5 Burr., 2740.

[2] 2 R. S., 587, § 59; 2 N. Y. S. at L., 608; 3 How., 164; 4 Cow.., 73; Supreme Court, Rule 22.

[3] 2 R. S., 586, § 34.

[4] 2 R. S., 534; 2 N. Y. S. at L., 552.

somewhat from the ordinary proceeding in an action. If the defendant is in default of an answer, his default is taken, and judgment entered thereon. But in these proceedings, there is something usually required to be done; and the proceeding is designed to put the defendant in motion; therefore, if he fails or neglects to obey the mandate of the writ, he is to be proceeded against as for a contempt.

The attachment in such cases is granted against those particular persons who refuse to obey the writ, even when the mandamus was directed to a corporation; and when it is directed against several defendants in their natural capacity, the attachment will issue against them all, if they neglect or refuse to obey the writ. The members of a town council, or of the common council, may render themselves personally liable as for contempt, by their efforts to evade the force of the writ.[1]

The return of the writ.

As the writ corresponds to the complaint or declaration of the plaintiff, so the return also corresponds to the defendant's answer or plea; and hence, it should deny the facts stated in the writ on which the claim of the relator is founded, or it should show that they are not sufficient in law to sustain his claim; or, ad-

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[1] 10 Mod., 56; 1 Duer, 451, 512; 9 N. Y., 263.

mitting the facts, it may show other facts sufficient in law to defeat the claim of the relator.[1] But if the return set forth matters of evidence from which certain facts may be inferred, instead of positively and distinctly alleging the facts relied upon in answer to the mandamus, it will be bad on demurrer.[1] The same general rules applicable to a plea or answer, are also applicable to the defendant's return. Thus, it should be positive and certain;[2] must not be argumentative,[3] nor evasive.[4]

Any matter of which the defendant proposes to avail himself, in making his defense, should be set forth with all the particularity essential to an answer or plea. Thus, when the objection to the validity of a law springs out of the failure of the legislature to comply with the provisions of the constitution, which is not apparent upon the act itself, it should be distinctly set forth in the return. A mere assertion in the return, that the law was oppressive and unconstitutional in its passage, is not enough.[5] Such allegation is not a fact, but merely an argument or an averment of a principle of law.[6]

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[1] 10 Wend., 25; 5 Term R., 74; 16 Barb., 52; 8 How., 358; 11 Id., 89.

[2] 2 N. Y., 496; 1 Ld. Raym., 559.

[3] 5 Term R., 66; 6 Mod., 309.

[4] 1 Barb., 34.

[5] 8 N. Y., 317.

[6] 11 How., 89.

Several matters may be set up in the return, provided they are essential to a legal and valid defense, but such matters must be consistent with each other; for if otherwise, the whole will be quashed, as the court will not know which to believe.[1] But if such independent matters are not inconsistent with each other, some being good and others bad, the return may be quashed as to the bad, and the relator may be put to plead as to the remaining.[2]

The defendant is only called upon to answer the allegations of the writ, in his return; and if he goes beyond, and his return contains anything more than a full answer to the substantial averments in the writ, such matter may be rejected as surplusage, or be stricken out on motion; such surplusage does not afford proper ground for a demurrer.[3]

It is held that the pleadings in mandamus are the same as under the former system of pleading, and that the rules prescribed by the Code have no application to them.[4]

The return, like an answer, may be amended by permission of the court, and probably upon similar terms;[5] clerical mistakes can be amended after the return is filed.

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[1] 2 Salk., 436.

[2] 2 Term, 456; 5 Id., 66; 6 Id., 493.

[3] 2 N. Y., 490; 11 How., 89.

[4] 16 How., 4; 6 Id., 179; Code, § 471.

[5] 7 Term R., 699.

The return being defective upon its face, may be quashed by the court, upon the motion of the relator,[1] either in whole or in part.[2] The motion to quash the return is also in the nature of a demurrer to the plea, under the old practice.[3] So, also, where the return contains anything more than a full answer to the substantial averments of the writ, such additional matter becomes surplusage, and may be rejected.[4]

The same general rules apply to the answer as to the writ, for they are to each other as declaration and plea. Hence the reply must not be argumentative, double, &c.[5] But it is held that the court will not permit subordinate tribunals to be harrassed with *special* demurrers to returns made by them. If the relator is dissatisfied with a return made, conceiving it to be evasive, or the construction of any matter alleged in it to be of double character, upon suggestion of its insufficiency, a further or supplementary return will be ordered, and thus the rights of the party be effectually protected, as if permitted to demur *specially*.[6]

Under the statute[10] the party prosecuting the writ may demur, or plead to all or any of the material

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[1] Cowp., 413; 2 Salk., 436.
[2] 2 Term R., 456.
[3] See 9 Wend., 429.
[4] 2 N. Y., 496.
[5] See 11 How., 89; 8 Id., 358; Code, § 471; 16 How., 4; 6 Id., 179.
[6] Per SUTHERLAND, J., 9 Wend., 429.

allegations or facts contained in the return, to which also the defendant is to reply, take issue or demur. Thus the issue is to be formed, and the like proceedings are to be had for the determination thereof, as in actions on the case for a false return.[1]

The practice under these provisions is laid down by Justice SUTHERLAND thus: "Although these statutes contemplate formal written pleadings, in the ordinary mode of conducting suits, the practice of the court is virtually to allow pleadings *ora tenus:* that is, the relator is permitted to discuss the return, and to ask for a peremptory mandamus, and whilst he has not put in a *formal demurrer*, the case is considered as embraced in the description of non-enumerated business, and is heard as such. But if a formal demurrer is interposed, it becomes enumerated business, and can be heard only at the stated term. It is optional with the relator whether it shall be considered enumerated or non-enumerated business, unless the court specially direct formal pleadings to be interposed. No injury can result to the defendant in consequence of this privilege allowed the relator; for if he wishes to carry up the cause for review, the court permits him, after its decision to make up and file formal pleadings, so that the record may be made

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[1] 2 R. S., 586, § 55.

up; which privilege, however, is not granted to the relator, who has chosen to ask for a peremptory mandamus, without formally demurring. If dissatisfied with the decision of the court, *he* cannot carry up the cause for review."[1] In this latter respect, however, the practice is now different. The relator can now have the case reviewed by appeal, although he has not formally demurred to the return.[2]

After the return to the writ of mandamus has been filed, the party making the return may serve notice upon the relator requiring him to demur, or plead thereto within twenty days after such service; and if no plea or demurrer to such return be interposed within that time, either party may notice the matter for a hearing at the next or any subsequent special term at which the same may, according to the practice of the court, be heard as a non-enumerated motion, and the same may be heard or disposed of on the said return.[3] A failure to demur or plead to the return by the relator, admits the return to be true, and the court can decide thereon as upon a demurrer.[4]

Plea and demurrer. The relator may demur or

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[1] 6 Wend., 559, 560; see, also, 10 Wend., 632.

[2] L. 1854, 592; 19 Barb., 657.

[3] Supreme Court, Rule 51, 1858.

[4] See 6 Wend., 559; 7 Id., 475; 10 Id., 632; 1 Barb., 379.

plead to any or all the material facts contained in the return.[1] He may demur to part of the return and plead to the rest; but cannot both demur and plead to the same allegations.[2] The defendant may reply, take issue or demur to the defendant's plea.

Issues.

The issues raised in the proceedings are either issues of law or of fact, as in actions at law, and they are tried in the same manner. Issues of law are tried by the court, and are raised by demurrer to the writ, or to the return, or to some subsequent pleading awarded in such proceedings. These issues of law are raised on motions to quash or set aside the writ or return, &c. And so, likewise, an application for a peremptory mandamus without formally demurring to the return, is equivalent to a demurrer. In such case the facts set forth in the return are admitted to be true, and it becomes a question of law whether a peremptory mandamus should be awarded.[3]

But where a question of fact is raised by the writ and return thereto, or by the pleadings in the case, the cause must go to the circuit to be tried by a jury. And such issues of fact are to be tried in the county within which the material facts contained in the writ

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[1] 16 Johns., 61.
[2] 4 Wend., 38.
[3] 7 Wend., 475; 6 Id., 559.

are alleged to have taken place.[1] The preparation o the case, and the mode of trial, are the same as in personal actions. In general the relator holds the affirmative, and, therefore, the return is taken to be true until falsified upon the trial; although allegations in the return, which are denied by the relator in his reply, and not proved, are not to be taken as true on the trial.[2]

If, upon the issue, the finding is in favor of the relator, whether it be an issue of fact or of law, or if judgment be given by default, the relator recovers his damages and costs, the same as in an action on the case for a false return,[3] which damages are assessed by a jury on the trial of issues of fact joined, or are assessed on a writ of inquiry, where the judgment is by default or on demurrer.[4] The judgment is entered on the determination of the court, or the verdict of the jury, as in personal actions. But judgment for costs, or for damages and costs, in such cases, can be entered only by the special order of the court;[5] and execution issues thereon as in personal actions.

The finding and judgment.

The order for a peremptory mandamus corresponds

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[1] 2 R. S., 586, § 56.
[2] 12 How., 51.
[3] 2 R. S., 587, § 57.
[4] 2 Burr. Pr., 179.
[5] 3 How., 379.

to a judgment upon the findings of the court or jury. If a verdict on the trial of an issue of fact be found for the relator, or if judgment be rendered for him upon demurrer or by default, the statute requires a peremptory mandamus to be granted to him without delay.[1] Notwithstanding the language of the statute, it has been held that the relator, to obtain a peremptory mandamus, must move the court on notice to the opposite party, after the facts of the case are settled, either by default or verdict, &c., when the court can, in view of the whole case, pronounce upon the rights of the respective parties.[2] The peremptory mandamus is the determination or judgment which the relator seeks as the ultimate of the proceeding before the court, and the motion therefor is upon the principle of motion for judgment.

It is optional with the relator, unless the court specially direct the interposition of formal pleadings, to consider the motion for a peremptory mandamus as enumerated or non-enumerated business. If he prefer to bring it on as a mere motion, there being no formal issue in the case, it will be heard as a non-enumerated motion.[3] But if there is a demurrer to the return, or if an issue of law is raised upon the pleadings, the case will be put down upon the calendar

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[1] 2 R. S., 587, § 57.
[2] 3 How., 380.
[3] 6 Wend., 559, Rule 51.

as an enumerated motion.[1] But in either case, it should be noticed for special term.[2]

Costs. In these proceedings the court awards costs in its discretion,[3] as the equity of each case may require;[4] and they will not be entered against the party except by special order.[5] When allowed, costs will be given at the rate allowed for similar services in civil actions.[6]

Enforcement of the writ.

Obedience to the peremptory writ is enforced by attachment. This is issued upon affidavits showing the service of the peremptory writ upon the proper parties, and that it has not been obeyed.[7] A defendant who has prevented the service of such writ by keeping out of the way, may be ordered to show cause.[8] The statute directs a fine in certain cases.[9]

Appeal.

Since 1854, the decisions of the court in these cases are reviewed by appeal.[10] Either party may have the decision or order of the court granting or refusing a

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[1] Idem.
[2] Rule 40, 10 How., 353
[3] L. 1833, 395, § 6; L. 1854, 592, § 3; 19 Barb., 657.
[4] 1 Barb., 557.
[5] 3 How., 280.
[6] L. 1854, ch. 271, § 3.
[7] 2 Cai., 97.
[8] See 12 Mod., 312.
[9] 2 R. S., 587, § 60.
[10] L. 1854, 592; 19 Barb., 657.

mandamus, reviewing on appeal, in all cases, whether the order is made on the original application for the peremptory mandamus in the first instance, or on the application for the peremptory writ on the return of an order to show cause, or on the application for the peremptory writ after a return to the alternative writ has been put in, without formally demurring or pleading to such return.[1] It may also be taken from the final judgment after issue joined, &c., on the return of the alternative mandamus.[2]

The practice on appeal in these proceedings is, in most respects, like the usual practice on appeal, from orders and judgments in civil actions; that is, it is like such practice so far as the same may be applicable. The appeal is taken from the order or judgment of the court at special term to the general term.[2] The act of 1854 refers especially to sections of the Code 327, 329, 330 and 332, as applicable in cases of appeal in special proceedings. If on an appeal a stay of proceedings is desired, an application to the court or to a justice thereof for such an order must be made, which order will fix the terms as to security, &c., which is not to exceed the amount required on an appeal to the Court of Appeals.[3]

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[1] L. 1854, 592; 19 Barb., 657.

[2] 11 N. Y., 563.

[3] L. 1854, 592.

An appeal may likewise be taken to the Court of Appeals from the order or judgment at general term,[1] and the practice in such cases is substantially the same as appeals from judgment and orders in civil actions.

Mandamus.

A writ of mandamus is a process issuing from a court of competent jurisdiction directed to some chartered, corporate or public body or officer, or other person commanding the doing of some public act or duty in the performance of which the party applying for the writ is interested, and by the non-performance of which he is injured or aggrieved.[2] Through this process the courts exercise control over all public officers, corporations and persons or bodies invested with powers for *public purposes* to compel them to perform some *plain, legal duty, when the party has no other convenient or effectual remedy.*[3] It is issued on the relation of any person who has a clear, legal right to have that done which is set forth in the petition, and for the failure to do which there is no other *adequate,* specific remedy. The object and purpose of the writ is to prevent "a defect of justice."[4] In *Rex.*

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[1] Code, § 11; §§ 190–192, 194.

[2] 28 L. J. Q. B., 272.

[3] 10 Ad. & El., 531; L. R. 5 Q. B., 269.

[4] 1 Cowp., 376.

v. *Bristol Dock Co.*,[1] the court held that, where there was a specific remedy, even though only by indictment, a mandamus could not issue, unless the relator established a clear legal right thereto, and also show that the remedy provided was ineffectual to secure the result to which he was entitled. In that case, it was sought to compel the defendants to pay to the relators the damages that they sustained, by reason of the pollution by them of the waters of the river Avon under the provisions of the statute. The court held that the compensation provided by the statute did not extend to or embrace damages such as the relators sought to enforce, and that they show no more interest in the subject-matter thereof than all the public sustained, and for this reason were not entitled to the relief; also that, if the works wrought the damage set forth in the declaration, the relator's remedy was complete and ample under an indictment for a nuisance and a consequent abatement of the nuisance. So in *Rex* v. *Chester*,[2] the relator sought by mandamus to compel the Bishop of Chester to license him as a curate of an augmented curate. There was a cross nomination, and the writ was refused, because the relator had another specific, legal remedy by *quare impedit*, which would give all the relief to which the

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[1] 12 East, 429. [2] 1 T. R., 396.

party was entitled. Thus it will be seen, without reference to the multitude of cases upon this point, that, whenever there is an *adequate* specific *legal* remedy, whether by indictment or action, a mandamus cannot issue. Two circumstances must concur to authorize the issue of the writ: 1st, a clear legal right thereto, and 2d, the absence of any other equally adequate remedy for enforcing it.[1]

The fact that there is a remedy by indictment or action does not necessarily deprive the party of this remedy. It must not only appear that there is another remedy, *but also, that such other remedy is equally effectual to secure the results to which the party is entitled*, and if it is doubtful whether there is a remedy, the court will issue the writ.[2] The mere fact that there is another remedy does not preclude the issue of a mandamus, the question always is, whether there is another adequate and efficient remedy. If damages will afford proper relief, and an action can be had therefor, then the party will be left to pursue that remedy, but if, in order to do justice between the parties and afford proper relief, specific performance is essential, a mandamus will issue, although the relator may have another remedy. It is the *adequacy* of the remedy that affords the tort of right.[3] Thus in *Indianapolis*,

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[1] 6 Ad. & El., 372.

[2] Id.; 2 B. & A., 246; 3 Jur., 103; 1 B. & S. 5.

[3] 24 Mich., 468.

etc., R. R. Co. v. *State*,[1] the defendant railroad company having its track along and across the streets of the city, neglected to level and grade the embankments so as to render the use of the streets safe, easy and convenient by the public, and, upon an application for a mandamus to compel it to change their road-bed in its grade, etc., and to restore the streets to a more convenient and safe condition, it was held that, although persons damaged thereby might have a remedy against the city, and the city had also a remedy over against the railroad company, that this was not such adequate and specific relief as precluded the issue of a mandamus. So, too, it must appear that the writ would be beneficial and operative;[2] or at least, it must not appear that it would necessarily be inoperative and followed by no beneficial results. In such an event, even though it is plainly the duty of the defendant to do the act, yet if the court is satisfied that no benefit could possibly result from the writ, it will be denied.[3] So, too, it must appear that there has been a direct refusal on the part of the defendant to do the act which it is sought to enforce, or at least, circumstances which satisfy the court that the defendant does not intend to do the act required.[4] "There need not be

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[1] 35 N. J. L., 396; 37 Ind., 489.

[2] 27 Vt.

[3] 10 Jur., 159.

[4] 3 Ad. & El., 217.

a refusal in so many words," said LITTLEDALE, J., in the case last referred to. "It is not, indeed, necessary," said Lord DENMAN, C. J., in the same case, "that the word *refuse*, or any equivalent to it, should be used, *but there should be enough to show that the party withholds compliance, and distinctly determines not to do the act required.*

The question is, whether the party has done what the court sees to be equivalent to a refusal."[6] In the case previously referred to (*Rex* v. *Canal Co.*), the defendants were sought to be compelled by mandamus to go on and construct and complete the railway bridges and other works which by statute they were required to construct as a part of their right to build their canal. The relator served a notice upon them to go on and construct and complete certain works described in his notice. At the next meeting of the company they passed a resolution signifying their intention to go on. But the resolution not being carried into effect, the relators again by letter requested them to go on. The company replied by representing that certain parties had brought an action against them respecting their crossing their railroad, and they suggested the propriety of waiting the result of that action. The works were not proceeded with, and a mandamus

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[1] 2 Ad. & El., 588.

to compel them to do so was applied for. The court held that there was no such refusal to do the acts, as entitled the relators to a mandamus.[1] There should be a demand of the specific thing sought to be enforced, and a refusal or equivalent circumstances thereto. A refusal may be implied from a neglect to do, or take open measures for doing the act within a reasonable time after demand.[2] The writ presupposes two things to exist on the part of the defendant, *the duty and the power to do the thing sought to be enforced*, and both must be shown or the writ cannot issue, for the very foundation of the writ is *the right of the relator to have the thing done, and the duty of the defendant to do it;* also, *that the thing required to be done is possible, and within the power of the defendant to do*, and if it turns out that the duty does not exist, that the act is impossible, or that the defendant has not the power to do it, the writ is bad.[3] Where the act is *impossible*, even though the duty to do it is imposed by statute, a mandamus will not issue.[4] Thus, when a mandamus was brought to compel a railway company to go on and complete their works as required by statute, it was held that a return setting forth that the company had raised and expended all the funds which they were empowered to raise, and had no funds or power to raise them to com-

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[1] 4 Q. B., 162.
[2] 17 Q. B., 361.
[3] 6 Railw. Cas., 634.
[4] 16 Q. B., 28.

plete the works, was a complete excuse, and a mandamus could not issue because there was no possible method by which the defendants could obey the writ.[1] "A writ of mandamus," said Lord CAMPBELL, C. J., "presupposes the required act to be possible, and to be obligatory when the writ issues. Generally the writ suggests facts showing the obligation and possibility of fulfilling it."[2] But if the power and duty exists when the writ is applied for, the fact that the power may expire before a return can be made will not operate to defeat the writ, nor is it an objection to its issue.[3] "The question is," said COLERIDGE, J., "simply whether the company have time for an act which we assume they are bound to do. If we grant a mandamus they may prove on a return that they are not bound; and then the writ will not prejudice them. If it appears that they are bound, they will take no benefit by delay, because the time for compliance will at any rate run from the present time (the issue of the writ). As to sufficiency of time, the construction will be rigorous against them, *because they might have proceeded at first*, and are bound to make out very strictly that they have been unable." (A mandamus cannot be granted to undo that which has been done, even though the

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[1] 16 Q. B., 864.

[2] 1 E. & B., 253; id., 774 id., 372.

[3] 16 Q. B., 904.

method in which the act was done was unauthorized and unlawful, as to compel a corporation to remove the seal from the register of shareholders, when it was affixed there without authority.[1] Lord CAMPBELL, C. J., in this case said, "we must not grant this rule. * * The writ of mandamus is most beneficial, but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. *We grant it when that has not been done which the statute orders to be done; but not for undoing that which has been done.* We may, upon application for a mandamus, entertain the question, whether a corporation, not having affixed its seal, be bound to do so, but not the question whether, when they *have* affixed, they were right in doing so." In *The Queen* v. *Sanford*,[2] the court refused to direct the registrar to erase an entry of a birth which he had been induced to make by false representation. In *Reg.* v. *The Justices, etc.*,[3] the court ordered the quarter sessions to erase an entry confirming an order, on the ground that the sessions had no authority to confirm the order, but the authority of this case is directly impugned and overruled in *Ex parte Nash, ante. Laches* or delay in applying for a writ may be satisfactorily explained, and if it appears that the relators

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[1] 15 Q. B., 92.

[2] 1 Q. B. 886.

[3] 5 Q. B. 1.

were justified in believing that the defendants intended to do the acts, they cannot be defeated of their rights by this justifiable confidence in the defendants' intention to discharge their duty.[1] "The lapse of time is material," said Lord DENMAN,[2] "when the court is called upon to exercise a discretion," and in that case the relator having delayed applying for the writ for twelve years, seven of which had elapsed after the compulsory powers had expired, there being no reasonable explanation of the delay, it was held the writ should not issue. COLERIDGE, J., in the same case, commenting upon the effect of *laches* on the relator's part, said, "we have been asked what number of years will bar an application of this kind. It is not necessary to fix any number. *Any apparent laches unexplained is the bar.* It might take effect in a year." In all cases the question as to whether the relator is chargeable with *laches* must depend upon the circumstances of each case.[3]

In modern practice it is nothing more than an ordinary action at law in cases where it is the appropriate remedy, and does not issue in virtue of any prerogative power.[4] Its issue is a matter resting, in a measure, in the discretion of the court; but if a party

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[1] 16 Q. B. 886.

[2] 12 Q. B. 157.

[3] 2 Q. B. 47; 10 Ad. & El., 53.

[4] 24 How. (U. S.) 66; 4 Ark. 302.

shows himself legally entitled thereto, it is error to deny it. But, in order to entitle a party to its issue, it must appear that he has a legal right to it; and the fact that the parties *consent* thereto is not a good cause for its issue; and unless there is a clear legal right to have it issue, it cannot form the basis of a valid judgment. Nor should it ever be granted where there is reason to suspect that there is collusion between the parties.[1] And it only lies from a superior to an inferior tribunal to compel action; never to direct how it shall act, or to interfere with the exercise of a discretionary power;[2] and when the party has no other specific or adequate legal remedy.[3] But in the case of corporations and ministerial officers, they may be compelled to exercise their functions even though their is another remedy, where the duty is plain and its performance possible;[4] The writ will not generally be issued if proceedings have been *commenced* in equity, although the fact that a party *may* have relief in a Court of Equity is no reason why the writ should be denied.[5] Nor will it issue where the

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[1] 22 La. Ann. 379; 2 P & H. (Va.) 38; 12 Barb. (N. Y.) 217; 11 Ind. 205.

[2] 44 Ala. 333; 7 Cr. (U. S.) 577; 5 Peters (U. S.) 190; 7 Ala. 459; 10 Ark. 243; 5 Ga. 522.

[3] 44 Ala. 284; 11 Penn. St. 196; 25 Barb. (N. Y.) 73; 26 Ark. 482.

[4] 50 Mo. 338; 8 Kan. 458; 6 Lans. (N. Y.) 253.

[5] 53 Ill. 424; 32 Md. 32.

officer or tribunal against whom it is claimed has not the means to do the act required, or to compel the doing of an act, the doing or not doing of which rests in the *discretion* of the officer or tribunal against whom it is sought;[1] nor when the doing of the act is legally impossible, or when the power to perform it is not complete, but depends upon the action or approval of some other authority;[2] or will involve the officer in litigation, the result of which is doubtful.[3]

Courts will not interfere with the exercise of a discretionary power;[4] unless it appears that such discretion has been abused.[5] But where an officer or tribunal *refuses* to exercise its discretion, a writ of mandamus will issue to compel them to *act*, but will not direct the manner of their action or interfere with their discretion;[6] where an officer is invested with a

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[1] 32 La. Ann. 318; 44 Ala. 64; 26 Ark. 237; 23 La. Ann. 76; 44 Miss. 493; 13 Abb. Pr. (N. Y.) N. S. 159; 37 Conn. 103.

[2] 3 Oregon, 33; 33 N. J. 173; 27 Ark. 457.

[3] 34 N. J. 255.

[4] 17 N. J. 355; 1 Abb. Pr. (N. Y.) N. S. 230; 26 N. J. L. 311; 6 Cow. (N. Y.) 59; 40 Ill. 93; 18 B. Monr. (Ky.) 9; 3 Texas, 51; 11 Pick. (Mass.) 189; 2 Chand. (Wis.) 247.

[5] 2 McCord (S. C.), 170.

[6] 27 Ark. 106; 26 id. 613; 32 La. Ann. 76; 101 Mass. 438; 3 Brewst. (Penn.) 596; 44 Ala. 654; id. 333.

discretion as to the doing of an act, it cannot be compelled by mandamus;[1] and if judgment be given for the relator under such circumstances, it will be arrested on motion for the insufficiency of the writ.[2] Where the statute gives a corporation or public body the option of doing an act in either of two ways, the writ should require him to elect how to do the act and then to do it, and if it does not give him the benefit of the option, or state facts that show that the option no longer exists, it will be bad.[3] *In the South Eastern R. R. Co.* v. *The Queen*,[4] it was held that where the statute gave a railway company the right of crossing a highway either by carrying the road over the highway by means of a bridge or the railway over the highway, unless the record show that the option was at an end, a mandamus directing how the work shall be done, as, that the highway shall be carried over the railway by means of a bridge, is bad.[5] In *The Queen* v. *The London, etc., Railway Co.*,[6] it appeared that by statute when the promoters of an undertaking demand a compulsory sale of premises, the owner may refuse to sell less than the whole; but if they have given notice of requiring a bond, the

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[1] 12 Q. B. 654.
[2] Id.
[3] 4 H. L. Cas. 471.
[4] 17 G. B. 485.
[5] 14 Q. B., 472; id., 459; 3 Ad. & El., 535.
[6] 12 Q. B., 775.

owner cannot by reason of such notice require that the whole be taken, and the promoters, on his refusal to sell part, may abandon the purchase, and the purchase cannot be compelled by mandamus either for the whole or a part. To compel a municipal corporation to levy a tax to pay a judgment against it;[1] to compel assessors to correct an erroneous assessment;[2] to compel a railroad company to build and keep in repair bridges where the road crosses a highway;[3] or to pursue the mode prescribed in their charter as to crossing rivers or other water-courses, or the performance of any acts in the construction of their road affecting either public or individual rights;[4] to restore a public officer to his office when the facts to justify his removal therefrom are not clearly established;[5] and to restore a member of any society to his membership from which he has been wrongfully expelled.[6] To compel the sheriff to keep his office at the place designated by law;[7] to compel any officer, who by law is required at the close of his duties to return his books to a certain officer, to discharge that duty;[8] to compel

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[1] 6 Wall. (U. S.), 514; 6 id., 481.

[2] 45 Barb. (N. Y.), 644.

[3] 37 How. Pr. (N. Y.), 427.

[4] 9 Rich. (S. C.), 227.

[5] 3 H. & M. (Va.), 1; 35 Barb. (N. Y.), 531; 9 Wis., 254.

[6] 12 Cush. (Mass.), 402; 22 Mich., 86.

[7] 4 Wis., 27.

[8] 27 Ark., 106.

the incumbent of an office to deliver up the papers, property or insignia of his office to his successor, when the right of such successor is clear;[1] to compel any public officer to discharge a ministerial duty imposed upon him by law;[2] as a register of deeds, to record a deed required to be recorded in his office;[3] to compel a town committee to pay the land-damages to land-owners whose land is taken for a highway.[4] Thus, a writ of mandamus will issue to compel commissioners appointed to assess a tax for a specific purpose, to discharge their duty;[5] to compel a city council to appropriate money to pay certain expenses which it is empowered to by the legislature;[6] to compel the mayor and aldermen or other board clothed with the power, to carry out specific purposes and perform specific duties imposed upon them by law;[7] to compel trustees to admit children entitled to do so to attend the public schools;[8] to compel a board of canvassers to meet and make a complete canvass of all returns received by them;[9] to compel a judge of an inferior

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[1] 24 Vt., 658; 7 Cush. (Mass.), 226; 21 Pick. (Mass.), 148.

[2] 15 La. Ann., 603; 3 B. Monr. (Ky.), 648; 1 Morr. (Iowa), 31.

[3] Kirby (Conn.), 345.

[4] 29 N. J., 388.

[5] 51 Ill., 57.

[6] 3 Brewst. (Penn.), 596.

[7] 101 Mass., 488.

[8] 7 Nev., 342.

[9] 13 Fla., 55.

court to sign a bill of exceptions in a case tried there;[1] or to make up a record and give a judgment thereon, so that a writ of error may be brought;[2] to compel a judge to sign a judgment rendered by his predecessor;[3] to compel a judge to enter judgment on the report of a referee;[4] to compel the clerk of a court to issue execution on a judgment;[5] and generally to compel all officers, corporations or inferior tribunals to perform all ministerial duties imposed upon them by law.[6] But in order to entitle a person to the writ, two things must concur: 1st. A clear legal right to have the act done to compel the doing of which the writ is sought; and, 2d, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced, and that the discharge of the duty is not discretionary.[7] Permissive words used in a statute authorizing a thing to be done are often held to be directory and compulsory, particularly when the power or authority is given in order that it may be

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[1] 4 Coll. (Va.), 485; 1 Cai. (N. Y.), 511; 3 Cold. (Tenn.), 255; 3 Ill., 189; 5 Peters (U. S.), 190.

[2] 7 id., 634.

[3] 8 id., 291.

[4] 2 Cal., 245.

[5] 28 Cal., 68.

[6] 1 Cold. (Tenn.), 207; 10 Pick. (Mass.), 244; 20 id., 484; 1 Mich., 359; 34 Iowa, 175; id., 510; 2 Neb., 7.

[7] 35 N. J., 396; 13 Abb. Pr. N. S. (N. Y.), 159; 12 Barb. (N. Y.), 217; 1 Ohio St., 77.

exercised for the public benefit, and the interests of the public manifestly require the authority to be acted upon, and in such cases the performance of the duty will be enforced by mandamus.[1] But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it be shown that the public interests manifestly require such a construction to be put upon them. Railway acts, incorporating railway companies, and authorizing the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public, but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or refrain altogether from using them.[2] And when the words of a statute or charter are imperative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances

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[1] 5 Wall. (U. S.), 715; 19 Mich., 392; 6 Cold. (Tenn.), 398; 13 Fla., 55; 101 Mass., 488; 1 Gray (Mass.), 72; 10 Pick. (Mass.), 244; 44 Penn. St., 336; 39 Barb. (N. Y.), 651.

[2] 1 Ell. & Bl. 861; 22 L. J. Q. B., 225; 1 Ell. & Bl., 874; Id., 203; 2 W. Bl., 708.

have arisen rendering the exercise of the statutory power and command impracticable.[1] Thus, in an English case, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats may, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, etc.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants.[2] A writ of mandamus lies to compel the holding of a court and the discharge of certain functions;[3] where a court refuses to carry out the mandate of a superior tribunal;[4] to compel a Circuit Court to sign a bill of exceptions;[5] to hear an application for an attachment for violating an injunction;[6] to reinstate a cause improperly abated by order of court;[7] to compel an inferior court to make up a record and render judgment thereon, so that a writ of error may be brought;[8] to compel a court to issue

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[1] 16 Q. B., 884; 1 Ell. & Bl., 381; 22 L. J. Q. B., 191.

[2] Com. Dig., Parliament, R., 22; 1 D. & R., 148: 5 B. & Ald., 692, *n*; id., 691; 4 Dowl., P. C., 562.

[3] L. R., 5 Q. B., 251; 7 Cr. (U.S.), 577.

[4] 1 Blackf. (Ind.), 155.

[5] 5 Peters (U. S.), 190.

[6] 7 Cal., 130.

[7] 7 Ala., 459.

[8] 7 Peters (U. S.), 634.

process to carry a decree into effect where an appeal has been taken but no supersedeas obtained;[1] to compel entry of judgment on the report of a referee;[2] to compel the restoration of a cause improperly stricken from the docket;[3] to set aside an order dismissing a cross bill, and its restoration to the docket to abide the final determination of the cause;[4] to compel a judge to receive a verdict which he has improperly refused to receive;[5] and generally an inferior tribunal can be compelled by mandamus to do its duty, but the courts will never interfere, nor, indeed, have they the power to interfere, by mandamus, with the exercise of strictly discretionary powers of an inferior court or tribunal of any kind.[6] The rule is, that a mandamus will issue to an inferior court to compel the performance of an official duty to which a party is clearly entitled, and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the *manner* of the performance of which he has no reasonable dis-

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[1] 22 Gratt. (Va.), 458; 17 How. (U. S.), 275; id., 283.

[2] 2 Cal., 245.

[3] 20 Ala., 330.

[4] 46 Ala., 384.

[5] 46 Mo., 83.

[6] 4 W. Va., 300; 44 Ala., 654; id., 333; 14 Wall. (U. S.), 152; 24 Mich., 408; 47 Miss., 547; 9 R. I., 128.

cretion; and even where the right to exercise a discretion exists, and the court improperly refuses to exercise it, its exercise may be compelled, but the particular *mode* of its exercise must be left free from coercion or restraint.[1] It lies to compel a court to fulfill their duties and to hear and adjudicate upon a matter pending before it, when there is no reasonable excuse for not doing so.[2] But when the court or body has entered upon the matter, and have decided it, the court will not compel them to reconsider the matter, or rehear it, upon the ground that they have come to a wrong conclusion. In such cases the party must pursue his remedy by appeal or otherwise, as the writ of mandamus cannot be used to interfere with the discretion of a court or to compel them to act otherwise than according to their own judgment in a matter left to their discretion.[3] Whenever the law requires a thing to be done, and the public at large are interested in the doing of it, a mandamus will go to order it to be done by the person upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself in motion to do the thing, though it cannot

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[1] 37 Conn., 103; 26 Ark., 613; 1 Mich., 359.

[2] El. Bl. & El., 253.

[3] 13 Q. B., 325.

control his discretion.[1] Thus, after final judgment in an action, the court will not by mandamus, while the judgment remains unreversed, compel the court to avoid the *effect* of the judgment.[2] The court never grants a mandamus except it indisputably appears that the party to whom it is directed has, by law, power to do what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction;[3] nor where the amount involved is insignificant and would not benefit the petitioner;[4] nor to compel the payment of a sum claimed to be due under a contract that has not been done according to the contract;[5] nor to compel a person to amend the records after his term of office has expired;[6] nor when the act commanded is impracticable or legally impossible.[7]

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[1] 13 Pet. (U. S.), 404; 15 id., 9; 2 Men., 191; 10 N. J. L., 57; 3 Binn., (Penn.), 273; 24 Ala., 98.

[2] 6 Ala., 511.

[3] 6 Pet. (U. S.), 661; 15 La. Ann., 89; 1 H. & J. (Md.), 359; 2 Va. Cas., 208.

[4] 27 Vt., 297.

[5] 1 Jones (N. C.), 484.

[6] 20 Vt., 487; 12 Wend. (N. Y.), 183.

[7] 33 N. J., 173; 34 id., 254; 22 La. An., 611; 27 Ark., 457; 3 Oregon, 55; 54 Ill., 39; 36 Penn. St., 362; 15 Barb. (N. Y.), 607; 29 Penn. St., 129; 29 Barb. (N. Y.), 96; 20 Cal., 591; 27 Barb. (N. Y.), 94; 10 Wend. (N. Y.), 393.

Thus, a mandamus will not issue to compel the doing of an act which is prohibited by injunction;[1] but the United States Courts will not recognize an injunction issued by a State Court, enjoining the doing of an act that is sought to be enforced by a mandamus before it. *Johnson* v. *Riggs, ante;* or where it would be unavailable for want of power in the defendant to perform the act required by it; or fruitless or ineffectual;[2] or to perform an act which is not required by law as incident to the defendant's duties;[3] or to enforce a mere contract obligation where there is no trust;[4] or to compel the doing of an unlawful act;[5] or where there is a good reason on the part of the defendant for not doing the act, as for refusing to record a discharge of a mortgage, where the certificate is insufficient;[6] or to record a deed not properly acknowledged or attested, or for any cause not entitled to go upon the records; or for refusing to admit a person to a society — in this case a medical society — where he would be immediately liable to expulsion;[7] nor generally, when the right of the relator depends

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[1] 7 Ohio St., 278; 4 Hill (N. Y.), 481.

[2] 29 Penn. St., 121.

[3] 7 Iowa, 425; 22 Tex., 559

[4] 16 Ohio St., 278.

[5] 4 Humph. (Tenn.), 437; 11 id., 306; 11 Miss., 695.

[6] 32 Barb. (N. Y.), 612.

[7] 1 Hill (N. Y.), 665.

upon holding an act of the legislature unconstitutional;[1] nor to try the *title* to an office;[2] nor to compel the payment of unliquidated damages;[3] nor to prevent an anticipated error or defect of duty;[4] and generally, it may be said that a mandamus will not be issued unless the duty it is sought to enforce is a *legal* duty, clear and free from doubt, and the right of the party seeking redress through this summary remedy is equally clear, nor unless the remedy will be effectual, and the result sought to be obtained is of more than mere trifling consequence or importance.[5] The application for the writ and the answer are the only pleadings, and if the defendant demurs to the application, if the demurrer is overruled the writ will issue, and no other pleadings will be considered.[6] A mandamus will only issue to compel a judicial officer to act, it will not, in matter resting in any measure in his discretion, direct him how he shall act. Thus, it will not lie to compel a magistrate to accept the report of a referee which he has rejected;[7] nor to correct the entry of a judgment upon his docket;[8] but it will lie to compel him to amend his record according to the facts, when such

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[1] 20 Cal., 591; 2 Abb. Pr. (N. Y.), N. S., 548.
[2] 5 Hill (N. Y.), 615; 18 Mich., 338; 7 Ga., 473.
[3] 19 Ga., 97.
[4] 20 Md., 449.
[5] 27 Vt., 297.
[6] 3 Neb., 244.
[7] 2 N. H., 123.
[8] 17 Mo., 601.

amendment applies merely to a ministerial error, but in such cases it will not be granted when the amount involved is trifling, and the correction would be of no practical benefit to the relator;[1] nor, generally, to do any act, when they are invested with discretionary powers and have exercised them.[2] The question is not whether the officer invested with discretionary powers has acted wisely or unwisely, but whether he has acted at all, and within the scope of the powers conferred upon him; if so, he cannot be compelled by mandamus to act *de novo* or to change the result.[3]

Thus, where a board to canvass votes are unable to determine whether a word is *fifty* or *forty*, they are to exercise their discretion in determining in view of such evidence as they have before them, and a mandamus will not lie to compel them to change their finding or to hear new evidence.[4] So where a contracting board has issued bids for public work, and are only restricted by a requirement that when the contract is made it shall be with the lowest bidder, they, nevertheless, have the right to reject a bid as being deceptive, fraudulent or disadvantageous, and a mandamus will not lie to compel them to give the contract to the

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[1] 27 Vt., 297.
[2] 3 N. J., 576.
[3] 24 Iowa, 266; 4 Wall. (U. S.), 522.
[4] 7 Iowa, 390.

lowest bidder.[1] So, generally, when there is any valid reason for not doing the act sought to be enforced, a mandamus will not issue.[2] Where, however, a contracting board is required by law to give a contract to the lowest bidder, and the person making the lowest bid has in all respects complied with the law, the board may be compelled, by mandamus, to give the contract to him, and they cannot defend upon the ground that the state is the *real* defendant.[3] The duty of the board of canvassers of a county election is to receive and count the returns of votes, and not to judge of their validity, or of any fraud affecting them, that question being for another specially appointed tribunal, upon a case properly brought after the board have declared the result. Held; that the action of the board was in this matter ministerial only, and that mandamus would lie.[4] They are to decide whether the papers are returns, and signed as such, but they are not to judge as to their sufficiency, or as to the qualifications of the officer signing them.[5] As in this case, where it was held that they were not authorized to reject the return because the officers signing

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[1] 33 N. Y., 382; 12 Abb., 133; 11 id., 289.

[2] 27 Barb., 562; 29 Tex., 508; 20 Vt., 487.

[3] 46 Barb. (N. Y.), 254.

[4] 7 Clarke (Iowa), 186; id., 390.

[5] Id.

did not appear to be sworn.[1] A mandamus may issue compelling the board to include such returns, notwithstanding that supposed defect, leaving it for the election tribunal, upon the report of the board, to decide whether the defect is fatal. Though the command to include these might be considered to be a command to do a particular act—make the canvass—in a particular way, yet that is no objection to the mandamus, since here the manner of doing is of the essence of the deed, and is regulated by statute, and not left to the discretion of the party performing. Upon the question whether a word is "fifty" or "forty," the canvassers of an election are to exercise their discretion upon the evidence before them, and where there has been no clear abuse of discretion, the court cannot, by mandamus, upon the hearing of new testimony, order the board to come to a different decision.[2] The writ does not lie to compel the county officer to do that which no law makes it his duty to do.[3] Mandamus will not lie to compel the supervisors to issue a certificate to one whom they have declared not elected.[4] In general, where a man is refused to be admitted, or wrongfully turned out of any office or franchise that concerns the public or the

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[1] Id.

[2] 7 Clarke (Iowa), 390.

[3] 7 Clarke (Iowa), 425.

[4] 10 Cal., 376.

administration of justice, he may be admitted or restored by a writ of mandamus.[1] So to test the right of one elected to a public office.[2] But *contra*, *People* v. *Stevens*.[3] Against *judicial* officers or officers' invested with discretionary powers, the writ can only direct them to proceed to act, but against *ministerial* officers it may not only direct them to act, but also *how* they shall act;[4] as in the case of a board of canvassers to proceed and canvass the votes by the face of the returns.[5] When an officer is clothed with a merely ministerial discretion, the fact that he has exercised such discretion will not prevent the issue of a mandamus to compel him to do the act in a different manner, if the act must be done, and the discretion does not extend to deciding whether it shall be done or not. Thus, where a railroad company crossing a highway with its railroad was required by law to restore the highway across or along which it had been laid, it was held that if it elected to restore the highway in a particular manner, which proved ineffectual, this would not prevent the commissioners of highways from invoking the aid of a mandamus to compel them to make the restoration effectual.[6] A

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[1] 2 Head (Tenn.), 650.
[2] 20 Texas, 516.
[3] 5 Hill, 616; 18 Mich., 400.
[4] 1 Edm. Sel. Cas., 505.
[5] Fla. Sup. Ct. Dec., 1876.
[6] 58 N. Y., 152.

mandamus will lie to compel the commissioner of jurors to strike off the name of a person who, under the statute, is entitled to have his name stricken off. It is true he is required to hear and determine excuses, but when the excuse is a *legal* one, he cannot refuse to allow it, and the fact that he is required to hear and determine the sufficiency of such excuse is not a judicial act within the rule relating to mandamus.[1] In order to warrant a mandamus to compel a judicial body to act, there must be not only a clear legal right to have a decision in respect to the thing sought, but also to the thing itself.[2] Where a board of supervisors have a discretion as to how much shall be allowed upon a claim, a mandamus will not lie to compel them to allow more than they deem proper, but when the claim of the party is fixed by law, as the salary of an officer, they may be compelled to allow the entire claim.[3] A mandamus will not lie against any disbursing officer to pay a claim until the amount has been fixed as provided by law;[4] nor unless there are funds in his hands to meet the claim.[5] A mandamus will not lie to compel a county treasurer or the comptroller of a city to pay the salary of an officer or any claim against the body they represent, if any

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[1] 30 How. Pr., 78.

[2] 44 Barb., 148; 32 N. Y., 473.

[3] 30 How. Pr., 173.

[4] 18 Abb. Pr., 100.

[5] 1 Abb. Pr. (N. S.), 184.

legal steps remain to be taken before such officer can be required to pay, as if the law requires that the claim shall be audited, until it has been audited.[1] His legal right to have the act done must be clear. A mandamus will not issue to compel the comptroller to borrow money as required by law to pay a debt when the party has a remedy by action.[2] In an application for a mandamus to compel a State treasurer, or other State or municipal disbursing officer, to pay a claim, it should be alleged that all legal steps have been taken necessary to warrant the officer in paying it; and to sustain the mandate, it should appear that there are funds in his hands proper to be applied in its payment.[3] A mandamus lies to compel a gas company to furnish gas to the relator as required by statute, he complying, or offering to comply with the general conditions on which the company supplies others.[4] A town collector may be compelled to pay over moneys collected by him by mandamus;[5] and he cannot question the constitutionality of the act under which the tax collected was assessed, nor excuse his non-performance of duty upon the ground that the tax is illegal. When a mandamus is issued to a board of audit to compel it to audit an account,

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[1] 58 N. Y., 295; 5 id., 65; 46 id., 9.

[2] 66 Barb., 630.

[3] 39 Ind., 411.

[4] 1 Abb. Pr. (N. S.) 404.

[5] 55 N. Y., 180.

the court cannot compel them to allow it, nor fix the sum at which it shall be allowed.[1] Nor, when the act is at all judicial, can an officer be compelled by mandamus to perform it in a particular way. Thus, where a mandamus was ordered to compel officers to designate four papers having the largest daily circulation, it was held that the court could not direct *which* papers should be designated, but only could put the board in motion.[2] But if the statute provides how the papers shall be selected, mandamus lies to compel the board to give the printing to the papers selected by the statutory mode. On appeal from an order granting a mandamus compelling the defendants to award a contractor to the relator, which they had refused to do, the court will assume that there was no other reason for refusal than the reason which is stated by the judge to have been the one on account of which the relator's bid was rejected.[4] And the court will not, upon appeal, reverse the order, on the objection that the defendants no longer have it in their power to perform the duty required of them. That objection should be presented to the consideration of the court below, before the writ is awarded; and it was so presented in the cases in which

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[1] 2 Abb. Pr. (N. S.), 78.
[2] 39 Barb., 651.
[3] 46 Barb., 254.

the objection has been sustained.[1] A writ of mandamus to compel the award of a public contract is, to some extent at least, in the discretion of the court to grant or refuse; especially where no property of the relator has been taken or affected, and his claim rests altogether upon the interest of the State to have its work done by the lowest bidder, and not upon a legal right on his part.[2] The fact that the act required by the mandamus cannot be done without the taking of legal proceedings by the defendants will not prevent the issue of the mandamus, when the duty to do the act is clear and the right and duty to institute proceedings for the purpose covered by the mandate is also clear. This is not an impossible or unlawful act, and it matters not what steps the defendant may be compelled to take, if it is his duty to take them, the mandamus will be issued.[3] In such a case, if, without any fault or *laches* on the part of the defendant, he failed in the legal proceedings, it would be a good answer to any proceedings for contempt. Indeed, any defense existing at the time of the return is available. It is simply enough if a legal excuse for not doing the act exists.[4] A mandamus is a proper remedy to compel an officer or public body to do an act which it is the duty of such

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[1] Id.

[2] 27 N. Y., 378; 33 id., 383.

[3] 58 N. Y., 152.

[4] 1 T. & C., 193.

officer or body to do, and which the person applying has a right to have done, and where he has no other convenient or effectual remedy.[1] Thus, a mandamus lies to a board of audit to compel it to audit a claim required by law to be audited by it,[2] and to admit the claim, if legal, as a county charge, but the writ will not be used to control the exercise of their discretion as to the amount that shall be allowed;[3] and generally to compel a board of supervisors or audit to examine accounts when their refusal to do so is predicated upon reasons other than that the accounts are erroneous or insufficiently sustained by proof.[4] So, where supervisors erroneously refuse to renew a license for a ferry; to compel them to levy a tax;[5] or to reduce a tax imposed on real estate when by statute the power and duty to do so in proper cases is conferred, and generally in all cases where public officers refuse or neglect to perform a statutory or official duty, or to conform to the law in discharging their duties, and a particular party is affected thereby, he may have his remedy by mandamus.[6] A mandamus lies to compel a board of supervisors to levy a tax to repay a sum collected as a tax contrary to law which the legislature

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[1] 7 Cal., 286; 19 Barb., 468.

[2] 32 N. Y., 473; 28 Cal., 421; 24 How. Pr., 119.

[3] 19 Johns., 259.

[4] 21 How. Pr., 322.

[5] 32 Penn. St., 218; 12 Iowa, 237; 17 Ohio St., 605.

[6] 12 How. Pr., 224.

have directed them to repay.[1] So it lies to compel a county treasurer to issue his warrant for the collection of a tax, and it may be instituted by any citizen having a common interest in the collection of the tax.[2] Although where money has been raised by municipal corporations for the express purpose of paying a demand which would not be enforceable, and the money is in the hands of officers with directions to pay it, an action will lie against such officers to have the money so applied, the court will not, by mandamus, at the suit of a party having no right, compel an officer to raise or procure the money for the purpose of making such payment.[3] Thus it has been held that a mandamus would lie to compel the proper authorities to assess a tax to pay the interest on their bonds, they being authorized by statute to issue the bonds and required to levy a tax to pay the interest thereon;[4] and where the writ issues from the United States courts, it is no answer to the writ that they have been enjoined by a State court from doing the act. So it lies to compel public officers, who have advertised for proposals for a contract, to award the contract to one who is the lowest bidder, and has clearly

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[1] 36 How. Pr., 1.

[2] 37 N. Y., 344.

[3] 36 N. Y., 224; S. C., 34, How. Pr., 294.

[4] 6 Wall. (U. S.), 166; 24 How. (U. S.), 376; 5 Wall. (U. S.), 705; 4 id., 535.

conformed, in substance, to the requirements of the case. In such case there is no discretion left to the defendants, but the bidder is entitled to the contract as a matter of law.[1] This remedy is not defeated upon the theory that the State is the defendant, and that a party cannot sue the State. For this purpose, the State is not the defendant, but certain ministerial officers who are bound to perform their duties.[2] It may be granted to compel the clerk of a municipal corporation to execute a contract under the seal of the corporation;[3] but it is not the proper remedy to test a claim to the office of president of a board of public officers; the claim of the possession of the books and papers should be tried by the proceedings provided for that purpose by statute; and the title to the office should be tried by an action of *quo warranto*.[4] It lies to compel a county treasurer to pay the amount of a claim audited and allowed by the proper board.[5] To compel the issue of a warrant of distress against delinquent collectors of taxes.[6] A mandamus will not lie to compel a person to take an oath, when the taking of such oath would involve falsehood or perjury on his part. Thus, it was held that a mandamus would

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[1] 46 Barb., 254.
[2] Id.
[3] 2 Abb. Pr. (N. S.), 315.
[4] 2 Abb. Pr. (N. S.), 348.
[5] 41 Me., 15; 19 Barb., 468.
[6] 5 Pick. (Mass.), 323.

not lie to compel assessors to make an oath to their assessment roll, stating that they had assessed the value of real estate in a certain way, as required by law, when in fact they had not so assessed it.[1]

It lies to compel the trustees or committee of a school district to levy a tax to pay a judgment against the district;[2] it lies to compel an entry taker of a county to receive land entries wrongfully refused;[3] to compel a clerk to issue an execution;[4] to compel a sheriff to appoint appraisers to set apart exempt property;[5] to compel a county clerk to affix the county seal to county bonds whether issued by himself or his predecessor.[6] It has been held that a mandamus lies to compel the officer upon whom the duty is imposed, to approve the bonds of an officer, if in due form for the proper amount, and with sufficient sureties. But if the officer is made the judge of the sufficiency of the sureties, quere;[7] and undoubtedly correct, as an officer cannot be compelled to approve a bond, it necessarily involves the exercise of a discretion;[8] to compel a court to recognize a legally

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[1] 55 N. Y., 252.
[2] 34 Iowa, 510.
[3] 4 Heisk. (Tenn.), 122.
[4] 3 Abb. (N. Y. App. Dec.) 491.
[5] 2 Neb., 7.
[6] 34 Iowa, 175.
[7] 48 Ala., 386, *contra.*
[8] 44 Miss., 393.

elected and duly qualified district attorney;[1] to compel an officer to comply with his statutory duties, as a register on going out of office, to deposit his books with the county clerk;[2] to compel a justice of the peace to make a true record of a matter heard before him.[3] A person who has been unlawfully deprived of membership in a corporate society may be restored by mandamus;[4] so the two branches of a city council may be compelled by mandamns to meet in convention as required by the city by-laws to appoint a commissioner of streets;[5] so to compel a board to receive assessments to meet and confirm assessments made by the board established for that purpose, which they refused to confirm under the erroneous belief that they had no jurisdiction.[6] When an officer required by law to do a certain act upon a certain day, or on or before a particular day, gives notice before the day that he does not intend to perform the duty, this dispenses with the necessity of a demand, and is sufficient evidence of refusal. As, where it is the duty of an officer on or before a certain day to levy a tax to pay the interest on bonds, if, before the expiration of the time, he gives notice that he will not

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[1] 1 Cal., 352.
[2] 27 Ark., 106.
[3] 38 Conn., 105.
[4] 6 T. & C., 85.
[5] 111 Mass., 90.
[6] 6 T. & C., 129.

levy the tax, mandamus lies to compel him to do so.[1] When a jury agrees upon a verdict, reduces it to writing and brings it into court, and the court refuses to receive it, a mandamus is the proper remedy to compel its reception.[2] When an auditor refuses to issue a warrant upon an order of the supervisors, mandamus is the proper remedy, even though action lies therefor upon his official bond, because a remedy by action is not a *plain*, *speedy*, and *adequate* remedy within the meaning of the rule excluding this summary remedy.[3] A referee, commissioners of highways and all officers of bodies vested with judicial powers, who are charged with the duty of reporting the result of their action to the court, or to any specified body, can, after they have completed their judicial duties, be compelled by mandamus to make, sign and file their report. But if they are entitled to have their fees paid, they must be tendered to them before the writ is applied for.[4] An auditor cannot question the title of the municipality he represents, to lands upon which buildings are being erected by it, and refuse to pay a warrant properly drawn upon him upon the ground that it has no title to the lands, and the money called for by

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[1] 4 S. C., 430.
[2] 9 Kan., 608.
[3] 47 Cal., 488.
[4] 4 T. & C., 398.

the warrant is for the erection of such buildings. It is his duty to pay warrants legally drawn and a return to a mandamus setting up such facts is insufficient.[1] But it seems where a mandamus is obtained to compel a treasurer of a city to pay the salary of an officer, that it is a good answer to the writ, that there is another person who claims to hold the office, and who is in discharge of its duties, and the court will not, in such proceedings, decide the *title* to the office.[2]

A mandamus is the proper remedy to compel a county to issue its bonds in pursuance of its subscription to the capital stock of a corporation. Indeed, it would seem to be the only remedy;[3] to compel a corporation to transfer its shares, unless there is an adequate remedy by action;[4] or to perform statutory duties. Thus, when a railroad company had by act of the legislature received aid from the county in the construction of its road, and the act provided that it should tax receipts in payment for freight, it was held that mandamus would lie to compel them to take them.[5] Mandamus lies to compel county or city authorities to pay fees legally due to the clerk of

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[1] 47 Cal., 488.

[2] 55 N. Y., 252; 70 N. C., 93.

[3] 12 Kan., 127.

[4] 110 Mass., 95; 44 Cal., 173.

[5] 5 Heisk. (Tenn.), 125.

courts. Such fees are not in any sense discretionary;[1] to compel the payment of a dormant judgment against a city;[2] against a teacher of a public school, or against a school committee, trustees or other officers having control of the matter, to compel the admission of a person legally entitled thereto, as a scholar.[3] When a corporation fails to discharge its duties according to the requirements of its charter, or the statutes of the State, it may be compelled to do so by mandamus on the relation of any person having a special interest therein. Thus it has been awarded to compel a railroad company to run its cars to a particular point, and there to receive and discharge passengers.[4] It has been ordered to compel a turnpike company to fence its road;[4] to restore a highway to its former width;[6] to establish a uniform rate of tolls;[7] to build a bridge;[8] to reinstate its road after the rails have been taken up;[9] to bridge a private way.[10] A mandamus was applied for to compel a railroad company to receive the goods of the relator, and only refused upon the ground that the company was not, by its charter and

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[1] 60 Ill., 451; id., 413.
[2] 71 N. C., 260.
[3] 48 Cal., 36.
[4] 29 Conn., 538; 24 N. Y., 627.
[5] 1 Q. B., 860.
[6] 2 Rail. C., 694.
[7] 6 Q. B., 898.
[8] 7 Metc. (Mass.), 70.
[9] 2 B. & A., 646.
[10] 26 Ga., 283.

custom, carriers of that kind of goods.[1] So too a railroad company that has built its road or executed any of its works contrary to the requirements of its charter, may be made to conform them to the method prescribed by its charter on the relation of a party interested therein, but a specific demand must be made and be followed by a refusal, or what is equivalent thereto.[2] Mandamus lies to compel a board of canvassers to comply with statutory requirements and to make returns to the office or board to whom by law such returns are to be forwarded.[3] And so in all cases where the act is purely ministerial, and the duty is plain, its performance will be compelled at the suit of a proper party.[4] In England mandamus will not be granted to determine the right to a public office, *quo warranto* being the proper proceeding;[5] and the test of the applicability of a *quo warranto* are the source of the office; its tenure and the duties. In all cases where they are of a public nature, the office is a public office.[6]

A mandamus is a proper remedy to compel a board of

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[1] 7 Dowl. P. C., 566; 2 Shelford on Railways, 846.

[2] 4 Q. B., 162; 2 id., 64.

[3] 4 S. C., 485.

[4] 39 Texas, 83; 40 Id., 537; 40 id. 601.,

[5] 17 Q. B., 149.

[6] 13 Cl. & F., 520.

registration to admit the name of the relator to the registry —after demand and refusal — but it must clearly appear that the relator was and is entitled to registration, andthat the board have power to admit his name in obedience to the mandate. The fact that an action lies for the injury is no objection, as damages from the deprivation of such a right are not susceptible of proper estimation.[1] So, to compel a person to discharge the duties of a public office to which he has been elected;[2] and the fact that the statute imposes a fine for such refusal, and the return states that the fine has been paid, is no answer unless it is also shown that the fine is in lieu of service;[3] nor the fact that the person elected had not in all respects conformed to the requirements of the statute to entitle him to discharge the duties of the office.[4] When a cause has been improperly removed from the calendar, a mandamus will not generally lie to restore it, particularly if it was removed upon motion or by order of the court in the exercise of its discretion, or if the court has a discretion as to whether it shall be restored or not, and has exercised that discretion adversely to its restoration;[5] nor will the court issue a mandamus when the

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[1] 9 Ad. & El., 670; 1 G. & D., 28.

[2] 3 Doug. 237; 1 B. & C., 585; 6 M. & S., 277.

[3] 1 B. & C., 585.

[4] 6 M. & S., 277.

[5] 63 Me., 396.

act sought to be enforced has been enjoined by a court of competent jurisdiction, in proper proceedings;[1] but when one who is not a party to the injuction proceedings has rights which can be secured only by mandamus, it may be issued notwithstanding the injunction.[2] A person cannot be compelled to do an act when he is invested with discretion whether to do it or not, or how he will do it. Thus, when the statute prevailed that the regents of the university might, in their discretion, install two professors of homœopathy in the department of medicine in the university, it was held that they could not by mandamus be compelled to do so.[3] It will not lie to compel the doing of any act, in reference to the doing of which or not, the defendant is invested with a discretion, nor to direct how an act shall be done when the defendant is invested with a discretion as to the *method* of doing it.[4] It will not issue to compel the discharge of a prisoner, upon the ground that he has once been put in jeopardy for the same offense. He must avail himself of this as a ground of defense upon another trial;[5] nor to compel the granting of a license to do any act where they are invested with *any* discretion in reference to the

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[1] 13 Kan., 92.
[2] 12 Kan., 127.
[3] 30 Mich., 473; 40 Tex., 537.
[4] 26 Mich., 146; 53 N. Y., 103; 19 Minn., 103.
[5] 45 Cal., 248.

matter, which may be inferred from the purpose of the act;[1] nor to compel the doing of an act when the statute of limitation has run, and in determining that question reference is to be had to the time when the right on the one hand and the duty on the other attached, and not to the time when the demand was made.[2] An auditor cannot be compelled to audit a claim that is not a legal charge against the body he represents;[3] nor can a treasurer be compelled to pay a warrent drawn on the treasury, when any steps remain to be taken before he can pay it legally, or when the requirements of the statute, the lawful rules of the department, or the by-laws of the corporation have not been complied with.[4] Thus, a State treasurer cannot be compelled to pay money by mandamus except when he has the money with which to meet the claim and illegally withholds it, and the same rule applies in the case of all disbursing officers. A legal claim on the part of the plaintiff, and ability to pay and an illegal refusal to do so, must be established. If there is a reasonable excuse for not paying, payment cannot be enforced, and as to what is or is not a legal excuse will depend upon the circumstances of

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[1] 45 Ind., 501.

[2] 13 Q. B., 484; 34 Iowa, 175.

[3] 47 Vt., 250.

[4] 49 Cal., 422; 37 N. J. L., 84.

the case.[1] A State treasurer cannot be compelled to pay money which the legislature has directed him to pay, when the legislature had no constitutional power to direct the payment;[2] but if a warrent is legally drawn, and there are funds with which to pay it, a mandamus will lie to compel the payment;[3] nor will a corporation or public officers be compelled to go on with a work, when there are not fuuds, or means for raising them, in their hands sufficient to do what is required.[4]

A private citizen, asking for a mandamus against a city council or other public body, must show a right independent of that which he holds in common with *all* the public. He must show some special, personal interest therein.[5] *In People v. Green*,[6] the relator, a private citizen, prayed for a mandamus to compel the defendant, who was a county officer, and had removed his office from the former county seat to a place to which he claims the county seat has been changed, it was held that a mandamus to compel his removal of the office to the former county seat could not issue upon his relation, because the petition did not show any *special* or *particular* interest in him in reference

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[1] 26 La. An., 127; 49 Cal., 512.
[2] 72 N. C., 5; id., 275.
[3] 49 Cal., 303.
[4] 30 Mich., 353.
[5] 9 Phil. (Penn.,) 481.
[6] 29 Mich., 121.

to the matter, except such as existed in behalf of *all* the public; also because it did not appear that any demand had been made for such removal, followed by a refusal on the part of the officer. When a person applies for a manadmus to compel the performance by a public officer of a duty in which others are equally interested with himself, the fact that others may be benefited thereby is no objection to his right to proceed by mandamus; but he should proceed entirely upon *his own right* and cannot derive any aid from the right of others, nor can he claim any thing for others. Thus, when the relator or plaintiff applied for a mandamus to compel the comptroller to levy a tax to pay the interest on certain State bonds, of which the plaintiff was the holder of only one, it was held that his remedy was confined to that particular bond, and could not be extended to include others of the same class.[1] The writ should issue against the person or body upon whom the duty by law devolves. Thus when a mandamus was prayed for to compel the clerk of the common council of a city to amend his record so as to show the appointment of the plaintiff as policeman, it was held that neither the common council nor the city were necessary, or even *proper* parties thereto. The duty entirely devolved upon the clerk, and he

[1] 4 S. C., 430; 45 Cal., 60; 11 Kansas, 66; 25 La. Ann., 622.

alone had authority or power to do the act prayed for, consequently was the only party who could properly be commanded to do the act, and the fact the change in the record would prepare the way for the displacement of another policeman, or to make the city chargeable for his services if he should assume the office, does not affect the question.[1] Mandamus will not lie to prevent the payment of money from one fund that should properly be paid from another;[2] nor to compel a merely private person to deliver up papers or books to public officer or other person, although such books and papers were made under order of the court and paid for by the county. In such case there are other ample remedies if the person has no legal claim to the documents;[3] nor to enforce obedience to a writ of *habeas corpus*.[4] The fact that the officer sought to be mandamused predicated his refusal to do the act upon a particular ground, does not prevent him from giving and relying upon other grounds as an answer to the writ. Thus, where a writ of mandamus was applied for against the teacher of a public school to compel him to admit the plaintiff to the school, it appeared that when the demand for admission to the school was made, he predicated his refusal upon the ground that

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[1] 41 Conn., 448.
[2] 58 Mo., 276.
[3] 58 Mo., 571.
[4] 66 Ill., 59.

the plaintiff was a person of color — a negro,— but in answer to the writ he set up that the plaintiff had not the requisite qualifications of learning to enter that school. It was objected that the return was bad because it set up a different ground than that upon which the refusal was predicated when the demand was made upon him, but the court held that the rule, that a party who leaves his refusal to do an act on some defect in the proceedings of his adversary, will not afterward be permitted to allege a new or additional defect does not apply in such a case.[1]

The validity of a claim must be settled in order to warrant a mandamus to compel its payment by a public officer. Its validity cannot be tried, nor can it be examined on a hearing for a mandamus. In such cases the courts only interfere when the relator's right is clear and indisputable. If any thing remains to be done, to fix the liability of the corporation to pay, even though it is a mere matter of computation, if such computation is required to be made by a particular officer, the court will not interfere;[2] nor to compel the removal of obstructions in a highway, where the statute has provided a remedy by indictment;[3] nor to compel the payment of money due for

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[1] 48 Cal., 36.

[2] 5 T. & C., 382; 49 Miss., 311.

[3] 66 Ill., 337.

labor performed for a municipal corporation;[1] nor to compel a judge *a quo* to reduce the amount of a bond as fixed by him to set aside a sequestration. The act is judicial, and he cannot be compelled to act contrary to his judgment or discretion;[2] nor to require the dismissal of a cause for want of jurisdiction over the person of the defendant, when such person has appeared in the action or in any wise submitted to the jurisdiction.[3] The fact that the plaintiff or relator is a member of a board or partnership whose action he seeks to enforce does not deprive him of the remedy by mandamus. The rule in reference to ordinary civil actions does not apply.[4] Where a person indicted, tried and convicted of a crime escapes, and is not in custody either actual or constructive, he cannot apply for a mandamus to compel the sealing of a proposed bill of exceptions;[5] nor to settle a bill of exceptions when there is a dispute as to the incidents of trial. The judge's determination as to what occured upon the trial is conclusive on such an application.[6] In *Douglass* v. *Loomis*,[7] it was held that a mandamus requiring a judge to certify to a bill of exceptions that the bill which he is required to cer-

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[1] 37 N. J. L., 84;
[2] 26 La. Ann., 116.
[3] 30 Mich., 10.
[4] 38 Iowa, 440.
[5] 59 N. Y., 80.
[6] 4 T. & C., 1.
[7] 5 W. Va., 542.

tify does not truly state the facts, is sufficient to defeat the writ. An escaped prisoner cannot take any action before the court. If he seeks its aid, he must come within and submit to its jurisdiction. It would be a novel spectacle for a court to exercise its jurisdiction and power in favor of one who defied it and is in actual contempt.[1] The mandatory clause of a writ must be specific, certain, and definite, and must not command more than it is the legal duty of the defendant to do, and must not trench upon his discretionary power, if he has any, as, if the mandate is uncertain, or commands more than the defendant is legally bound to do, or interferes with his discretion, the writ will be bad, and will not be sustained upon appeal.[2] The mandate should be so certain and definite that the defendant will not be required to look beyond the writ to ascertain his duty; and the facts upon which the relator relies must be set forth so definitely and fully that the defendant can take issue thereon.[3] A motion for a writ, notwithstanding the answer, amounts to a demurrer and admits its truth.[4] The fact that the relator was not entitled to the writ when applied for, but was entitled to it when the application was heard, will not permit

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[1] 17 Q. B., 503; 31 Me., 592; 97 Mass., 545; 14 Gratt. (Va.), 677.

[2] 57 Ill., 142; 60 Me., 276.

[3] 52 Mo., 89.

[4] 48 Cal., 36.

its issue. If at the time of final hearing, even though upon appeal, the relator becomes entitled to the writ without regard to the question whether he was entitled to it when issued.[1] The judgment of a court making a writ of mandamus peremptory is a final judgment and cannot be vacated or set aside on a rule taken by the defendant.[2] A writ of mandamus will not lie to restore a member of a religious society who has been expelled according to its rules and discipline for moral delinquency. The courts have no control in the matter, the society having power to make its own by-laws and rules for the admission and discipline of its members, and even though the society has no right under the statute to try a corporator for moral delinquency and cannot, by such or any action, deprive him of his rights as such, yet, having an adequate remedy at law, it cannot proceed by mandamus.[3] When a public office is vacant and a party has been elected to fill the office, the court will by mandamus enforce the right to the office; but where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder, and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo*

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[1] 31 Wis., 257.
[2] 24 La. An., 132.
[3] 53 N. Y., 103.

warranto, and not by mandamus.[1] If, however, there is only a colorable election, it is void, and a mandamus to hold an election will be granted.[2] And there are occasions where a *quo warranto* will lie, and yet the remedy by mandamus may be deemed a more appropriate remedy.[3] Wherever a person has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected to office, and the corporation refuses to institute him, a mandamus lies to compel them to do so;[4] but the court will not interfere where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote.[5] It lies to put a minister of any religious sect in possession of a pulpit of which he is unjustly deprived.[6] A person may be restored to an office from which he has wrongfully been expelled or removed by mandamus;[7] but his title to the office cannot be settled in such proceedings, only the *prima facie* rights of the parties.

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[1] 7 Ad. & El., 222; 12 Cl. & F., 520.

[2] 7 Ad. & El., 222; 6 id., 353.

[3] 44 Penn. St., 336; 23 Md., 482; 4 Nev., 400.

[4] 1 W. Bl., 551.

[5] 8 Ad. & El., 564.

[6] 4 H. & J. (Md.), 429; 2 Barb. (N. Y.), 377; 4 Mo., 26.

[7] 4 Term Rep., 125; 2 Ld. Raym., 959; id., 1265; id., 1334; H. & M. (Va.), 1; 9 Wis., 254; 2 Bay (S. C.), 105; 3 Nev., 202; 1 Ill., 25.

The proper remedy by which to determine the actual title to an office is by *quo warranto*.[1] Mandamus lies to compel a railroad or canal company to build and repair bridges which by law they are bound to build.[2] and to pursue the course prescribed in their charter, in crossing streams and water-courses, so as not to impede navigation;[3] to compel the president of a corporation to do any act imposed upon him by the charter which affects the public interest;[4] to compel the cashier of a bank to allow a bank director to examine the discount book;[5] and generally to discharge any duty imposed upon it by law.[6] As to deliver at a particular elevator on its line, whatever grain in bulk may be consigned to it. To so grade its track in passing through streets or alleys as to render the streets, alleys, and crossings easy and convenient of access; to complete its railroad when bound to do so by law. The writ is available, also, for the purpose of enforcing performance of the duties imposed by charter, custom, or contract on a body corporate in favor of particular members thereof. Where there is

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[1] 5 Hill (N. Y.), 615; 18 Mich., 338; 7 Ga., 473; 29 Ill., 413; 2 Min., 180.

[2] 57 How. Pr. (N. Y.), 327; 26 Ga., 665.

[3] 9 Rich. (S. C.), 247.

[4] 23 Md., 296.

[5] 12 Wend. (N. Y.), 183; 1 How. Pr. (N. Y.), 247.

[6] 56 Ill., 365; 37 Ind., 489; 18 Minn., 40.

a dispute and matter of controversy between the corporation on the one hand, and one of its members on the other, respecting the corporate rights and privileges of the latter, a mandamus may be obtained at his instance against the corporation, commanding them to allow him to inspect the corporate records, by-laws, minute-books, and other documents relating to the matter in controversy, to see whether he can make out a case in his favor, and initiate proceedings against the corporation with a prospect of success.[1] But the court will not grant a mandamus for a general inspection of all records, muniments, etc., but only of such as relate to the particular matter in controversy.[2]

Mandamus is the proper remedy to compel the incumbent of an office to deliver the books, papers, property, and insignia of his office to his successor;[3] as to compel a person whose term of office as mayor has expired, to deliver up to his successor the seal, books, papers, muniments, etc., the property of the city, properly belonging in the custody of the mayor;[4] so to compel the delivery to the selectmen of the town, the books, papers and property belonging to an office, in the hands of persons who have usurped it; to compel

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[1] 31 L. J. Q. B., 62.

[2] Id.

[3] 19 N. H., 215; 7 Cush. (Mass.), 226.

[4] 15 Ill., 492; 25 id., 325.

a town clerk to deliver the records of the town to his successor;[1] to compel ex-officers of a church or other corporation to deliver up the books and property pertaining to his office, to his successor.[2] So it is a proper remedy to restore an inspector of tobacco to the office from which he has been irregularly removed;[3] but the *title* to an office cannot be tried under this remedy;[4] it has been held a proper remedy to restore an attorney to the rolls who had been improperly disbarred by an inferior tribunal.[5] The courts have refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents,[6] but the remedy by action is not an effectual remedy for the recovery of the documents themselves; and wherever a private individual, who has quitted office, keeps back public documents of which he obtained custody whilst acting in an official character or capacity, and by

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[1] 2 Pick. (Mass.), 397.

[2] 7 Cush. (Mass.), 226.

[3] 2 Bay (S. C.), 105; 3 H. & M. (Va.), 1; 9 Wis., 254; 20 Tex., 516; 2 Head (Tenn.), 650; 35 Barb. (N. Y.), 535.

[4] 5 Hill (N. Y.), 615; 18 Mich., 338; 7 Ga., 473.

[5] 1 Johns. Cas. (N. Y.), 181; 7 Wall. (U. S.), 364; 36 Ala., 252.

[6] 1 Q. B., 169.

color of his office, the court will by mandamus compel the production of the documents, and if private and public documents have been so mixed up together that they cannot be severed, the whole must be produced.[1] Thus, a mandamus will be granted to a person who has previously served the office of town-clerk, directing him to deliver up records and books connected with the administration of public justice in the borough, which came into his custody as town-clerk, and to hand them over to his successor in the office.[2] Members of a corporation have no right, on speculative grounds, to call for an examination of the books and muniments, to see if they can fish out of them some complaint or charge against corporate body. It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is interested, and in respect of which the examination becomes necessary.[3] The writ goes also to a corporation or chartered company, to compel it to fulfill the duties it has contracted toward strangers, where there is no other suitable or effectual remedy. A judgment creditor, therefore, of a trading corporation may obtain a mandamus enjoining the corporation

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[1] 6 Ad. & El., 399.
[2] 1 Wils., 305; 1 W. Bl., 49.; 2 Str., 879.
[3] 2 B. & Ad., 115.

to give him inspection of the register of shareholders, if he has no other or effectual means of obtaining such inspection.[1] There is no practical distinction in this respect between companies existing by statute and companies created by charter. A mandamus, therefore, lies against a company incorporated by statute, commanding them by the hand of their secretary to enter on their books, or to register, the probate of the will of a deceased shareholder.[2] Also transfers, or memorial of transfers, of shares.[3] But if the prosecutor of the writ of mandamus is not proceeding *bona fide* for the purpose of enforcing his rights as a shareholder, and has no interest himself as one of the public in the performance of the thing which he seeks to have done, he is not entitled to the writ.[4] Nor will the court grant the writ at the instance of one of several partners in a trading corporation, who seeks merely to compel the director to produce their accounts and divided profits, the court of chancery being the proper tribunal for that purpose.[5] Mandamus is the proper remedy to compel a municipal corporation to levy a tax to pay a judgment against it, where levy cannot be made under the execution;[6] so to compel

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[1] 3 El. & Bl., 784.
[2] 1 M. & Ry., 529.
[3] 17 Ad. & El. (Q. B.), 645.
[4] 21 L. J. Q. B., 284.
[5] 2 B & Ald., 622.
[6] 2 Bliss. (U. S.), 77.

the State auditor to issue his warrant to pay money due from the State for property *delivered* to it under a contract;[1] so to compel supervisors to raise money to meet a claim against the county, even before the amount has been judicially determined;[2] but a comptroller of a State or city cannot be compelled to pay a debt against the State or city where there are no moneys in his hands appropriated for such purposes;[3] In all cases, when there is a legal right in the relator to have the thing done, and a corresponding obligation on the part of the officer, public body or corporation to do it, *and there is no other equally adequate remedy*, a mandamus may issue, and thus it will be seen that the range of the writ, its office and power, is extremely mild and covers a multitude of cases that it would be impossible to enumerate. It may be used to compel a corporation to compel the enforcement of common law or statutory rights, and their number may be legion. It has been held a proper remedy to compel the affixing of a corporate seal to a document; it lies to compel a corporation to transfer stock of a shareholder, but not if there are unpaid assessments due thereon; or any lawful rules of the company have not

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[1] 58 Ill., 90.

[2] 3 Abb. App. (N. Y.), 566.

[3] 24 La. Ann., 16; 27 Barb. (N. Y.), 89; 2 Abb. Pr. (N. Y.), N. S., 315.

been complied with;[1] to compel arbitrators to appoint an umpire;[2] to compel a corporation to send a dispatch, as required by law;[3] to compel an officer of a corporation to make an annual report as required by statute or by the by-laws of the company; to compel tax commissioners, or assessors, or whatever body by law is required to do so by statute to meet to hear appeals.[4] A mandamus lies to compel the holding of an election for officers of a school district or other corporation;[5] to compel a register to register a deed, but not, when by reason of defects upon the face of the deed it is not entitled to be admitted to the record[6]; to compel a jailer to give up the body of a prisoner dead within the jail, for burial;[7] to compel a railway company to complete its line.[8] It is no answer to an application for a mandamus to enforce the performance of a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by mandamus.[9] Where there is another remedy equally convenient, beneficial and effectual, a mandamus will

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[1] 17 Q. B., 645.
[2] 2 Smith, 388.
[3] 4 B. & Ad., 530.
[4] 18 Q. B., 155.
[5] 52 N. H., 298.
[6] 15 Q. B., 598; id., 974.
[7] 1 G. & D., 566.
[8] 17 Q. B., 361.
[9] 2 B. & Ald., 809.

not be granted. "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus."[1] If an action of debt is maintainable and affords an equally convenient, adequate and effectual remedy, the courts will leave the parties to their legal remedy;[2] but the fact that the defendant may be indicted is no answer;[3] unless it is shown that an indictment will furnish a more adequate remedy than a mandamus;[4] the mere fact that right of action for damages exists will not exclude a mandamus where such remedy does not go to the specific relief sought.[5] A party applying for a mandamus must make out a legal right and a legal obligation, and if he show such legal right it is sufficient, although there be also a remedy in equity, for when the court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law. A legal obligation, which is the proper foundation for a mandamus, can only arise from the common law, from a statute or from contract. The fact that

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[1] HILL, J., 30 L. J. Q. B., 271.

[2] 8 Ad. & El. (Q. B.), 70.

[3] 2 Ad. & El. (Q. B.), 70.

[4] 4 B. & C., 901; 3 R. T., 22.

[5] 3 How. Pr. (N. Y.), 78; 25 Barb. (N. Y.), 27; Cooke (Tenn.), 160; 4 Kan., 250; 26 N. J., 99; 23 Vt., 478; 2 Gratt. (Va.), 575; 2 McCord (S. C.), 170; 12 La. Ann., 342; 11 Ind., 205.

a person may have the specific relief sought for in equity is no good ground for refusing a writ of mandamus. The application for the writ being addressed to the discretion of the court, it may consider all the *equities* as well as the facts, and should be guided by the legal rights and *equities* of the case;[1] but if proceedings for the particular relief have been brought, and are pending in a Court of Equity, the party will generally be left to pursue his remedy there.[2]

Where the duty sought to be enforced is the payment of money and an action at law lies therefor, and affords as convenient and effectual a remedy as a writ of mandamus, the party will be left to his legal remedy, as the purpose of a mandamus is to afford relief when there is no other adequate remedy. It must appear that the relator has a clear legal right to the relief demanded against the person to whom he seeks to have the writ directed, and that it is the duty of such person to do the act, the doing of which the writ is sought to enforce.[3] Thus, where, by law, certain instruments are required to be recorded, and it is the duty of certain officers to record them, if such officer refuses to enter upon the record an instrument entitled to record, he will be compelled to discharge the

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[1] 32 Md., 32; 53 Ill., 424.

[2] Id.

[3] 42 Barb. (N. Y.), 217; 11 Ind., 205; 12 Barb. (N. Y.), 217; 25 Id., 73; 4 Ark., 302; 48 Ala., 170.

duty by peremptory mandamus.[1] So where it is the duty of a board of canvassers to canvass the votes cast for a certain officer at an election, and give a certificate to the person receiving the largest vote—as for senator—the board will be compelled, by peremtory mandamus, to give their certificate to such person, irrespective of the question of his right, otherwise, thereto. They are not to pass upon questions of fraud or other irregularities, but simply to canvass the votes and give their certificate to the one to whom by law they are required to give it. Their duties are purely ministerial, and being plain, simple, and unquestionable, they will be compelled to perform them.[2] Where the functions of a canvassing board are merely ministerial, they may be compelled by mandamus to canvass the returns by mere computation, and to give certificates to the persons having the largest number of votes, leaving all judicial questions to be determined by the courts. *But where they are invested with judicial functions they may exercise them to the extent given by law.*[3] This may not be done when they have already certified to the governor that the election is null and void, and they cannot then be compelled to return as

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[1] 14 Johns. (N. Y.), 325; Kirby (Conn.), 345.

[2] 2 Minn., 180; 29 Ill., 413.

[3] 7 Iowa, 186; id., 390; Florida Sup. Ct. Dec., 1876.

elected, those receiving the largest number of votes.[1] So, where a judgment is obtained against a municipal corporation, and there is no other method to enforce its payment, a mandamus lies to compel its payment.[2] So, to compel the payment of land damages for land taken for a street or highway;[3] and so in *all* cases where the duty of the person, officer, board or corporation against whom the writ is sought, and the right of the person seeking it is clear, and there is no other *adequate specific* remedy, the remedy by mandamus exists.[4]

The mere fact that the party has another remedy is not of itself sufficient to warrant a denial of the writ. There must be some other equally *adequate, specific* legal remedy, which will place the party in the situation to which his rights entitle him, and in which it is the duty of the officer, board, or corporation, or person against whom the writ is sought, to place him.[5] Thus, the fact that a person who has a right to have an instrument recorded has a remedy against the officer whose duty it is to record it, for refusing to record it, in damages, does not deprive him of his

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[1] 3 Brev. (S. C.), 491; id., 264.

[2] 50 Ill., 453.

[3] 29 N. J., 388.

[4] 7 Cal., 276.

[5] 7 Port. (Ala.), 37; 1 Pike (Ark.), 11; 2 Ired., 430; Dudley (Ga.), 37; 30 How. Pr. (N. Y.), 78.

remedy by mandamus, for the remedy by action is not the *specific* relief to which he is entitled; nor does it even tend to place him in the situation in which by law he is entitled to stand. The failure to record may defeat his title to property, and the remedy in damages is not *adequate* within the meaning of the term. But where a party holding a judgment against a municipal corporation is entitled to an execution, and there is an ample remedy for the collection of the money due thereon by levy upon municipal property, *then mandamus* will not lie, for the party has an adequate remedy for the specific relief to which he is entitled, to wit, the liquidation of his judgment; and thus in *all* cases where there is no adequate legal remedy by action, equivalent to a *specific* remedy, and the right on the one hand and the duty on the other is clear;[1] and the writ will be effectual to secure the right;[2] and the amount of interest involved is not insignificant;[3] and the act sought to be enforced is not unlawful;[4] or discretionary;[5] and there is no sufficient excuse for a refusal to do the act;[6] a mandamus will generally be granted; but it must be remembered that the writ is not purely

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[1] 1 Cr. C. C. (U. S.), 7; 27 Mo., 225.

[2] 40 Me., 404; 29 Barb. (N. Y.), 96; 29 Tenn. St., 121.

[3] 27 Vt., 297.

[4] 11 Humph. (Tenn.), 301.

[5] 11 Pick. (Mass.), 189; 1 Yeates (Penn.), 46.

[6] 32 Barb. (N. Y.), 612.

a matter of right, but, like the granting of an injunction, rests in the sound discretion of the court, in view of all the facts set forth in the petition, affidavits, or proved upon the hearing.[1] A mandamus properly issues from a court of general jurisdiction, or from a court of the highest jurisdiction to an inferior court, when the act sought to be enforced is on the part of a judicial tribunal.[2] There are two classes of writs, one called *alternative*, and the other *peremptory*. The usual course in applying for a mandamus is to present a petition to the court by law clothed with the power to issue it, setting forth the relief desired, the right of the relator thereto, and the duty of the defendant in the premises, properly verified by affidavit of the party. Upon this petition a rule to show cause why a mandamus should not issue is granted. If the cause is found sufficient, then a *mandamus* in the *alternative* issues, to which a return must be made, and if, upon the return, a sufficient excuse for not doing the act is shown, a *peremptory* mandamus issues; but except in cases entirely free from doubt, a *peremptory* mandamus will not be granted in the first instance. Upon petition and answer, where a peremptory mandamus is prayed for, the truth of the answer is ad-

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[7] 29 Me., 151; 22 Barb. (N. Y.), 114; 48 Ala., 160; 4 Ark., 302; 40 Me., 304.

[8] 1 Morris (Iowa), 31.

mitted; and the same is also the case on a motion on a showing against a rule to show cause why a mandamus should not issue; the truth of the showing is admitted. By the common law, the return to an alternative mandamus is taken to be true, and the party is left to his remedy for a false return.[1]

The writ of mandamus lies against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there be a penalty for their neglect.[2] It will go to a jailor to compel him to give up the body of a deceased prisoner for debt to his executors,[3] or to receive a prisoner;[4] to the trustees of a public charity, whose duty it is to furnish a church warden with the keys of a chest, enjoining them to deliver the keys;[5] to justices and clerks of the peace of a borough, to permit a rate-payer to inspect and take copies of a rate;[6] also to a corporation, commanding them to permit a member of the body corporate to inspect the minute-books, by-laws, and records of the corporation, for the purpose of determining a matter in controversy between the cor-

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[1] 25 Me., 333; 9 S. & M. (Miss.), 77; 7 R. I., 523; 37 Penn. St., 277; 27 Barb. (N. Y.), 89; 2 Wend. (N. Y.), 255.

[2] Comyn's Dig., MANDAMUS.

[3] 2 Ad. & El. (Q. B.), 246.

[4] 34 L. J. M. C., 137.

[5] 4 Ad. & El. (Q. B.), 161.

[6] 4 B. & C., 891.

poration and the individual member, respecting the rights and privileges of the latter under the charter.[1] But the court will not by mandamus compel the justices and the clerk of the peace of a county to allow rate-payers an inspection of the accounts and bills of charges of county officers settled and ordered to be paid at the sessions and deposited by the clerk of the peace amongst the county records, the rate-payers having no right to examine such accounts;[2] nor will the court interfere by mandamus with the administration of the funds of charities;[3] nor compel trustees of turnpike roads to repair and keep in repair a turnpike road;[4] nor will a mandamus lie to the king's officer to compel him to deliver up property which he holds in his hands on behalf of the government, for a mandamus to the officer in such a case would be like a mandamus to the government, which the court cannot grant.[5] The court will by mandamus compel the performance of a public duty by public officers, although the time prescribed by the statute for the performance of the duty has passed;[6] and if the public officer to whom the performance of the duty belongs has in the meantime quitted his

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[1] 31 L. J. Q. B., 62; 12 Wend., 183.
[2] 6 Ad. & El., 84.
[3] 9 D. & R., 214.
[4] 12 Ad. & El., 427.
[5] 5 id., 380.
[6] 27 L. J. Q. B., 436.

office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform.[1] In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his superiors, or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus and has left the parties to the ordinary remedies.[2] The party who is entitled to a mandamus to a public board, to compel the making of a certificate or assessment for the payment of a debt, should apply to the court within a reasonable time after default made. And if there is a *prima facie* case of laches or delay, the *onus* is thrown on the applicant of showing that he has not been guilty of such negligence as disentitles him to his remedy.[3] Where parties have acquiesced a year in the proceedings sought to be set aside, the writ will be denied in the absence of a sufficient reason for delay;[4] four years.[5]

State officers may be compelled by mandamus to perform an official duty involving the exercise of no

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[1] 3 Md., 452; Kirby (Conn.), 345; 45 Barb., 454.

[2] 6 Ad. & El., 401.

[3] 12 Q. B., 448.

[4] 2 Wend. (N. Y.), 204.

[5] 43 N. H., 503; 1 Johns. Cas. (N. Y.), 241; 12 Barb. (N. Y.), 446; 2 Wend. (N. Y.), 256; 16 Johns. (N. Y.), 59.

discretion.[1] Thus, the State auditor may be compelled to audit a claim, or to issue his warrant when required by statute upon a claim duly audited.[2] So, a State treasurer may be compelled to pay an order legally and properly drawn upon him.[3] A secretary of State may be compelled to give a commission to a person who is entitled thereto;[4] to furnish a copy of the laws;[5] to add the appropriate date and perform every other necessary act connected with the filing and recording of an instrument in his office;[6] to compel the attorney general to issue a certificate that a suit was properly instituted when such certificate is necessary, in order to collect costs against the State; to compel the governor to sign a commission when the party is legally entitled to it;[7] to sign a patent for lands legally sold by the State;[8] or to do any merely ministerial duty;[9] since overruled in *Rice* v. *Austin*.[10] In several of the States it is held that the governor cannot be

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[1] 15 Iowa, 538.
[2] 3 Bush (Ky.), 231; 40 Miss., 468.
[3] 15 Wis., 75.
[4] 1 Cr. (U. S.), 137; 17 La Ann., 156.
[5] 4 Kan., 379.
[6] 53 Penn. St., 9.
[7] 25 Md., 173.
[8] 4 Nev., 241.
[9] 39 Cal., 189; 36 Ala., 371; 30 Cal., 596; 7 Jones (N. C.), 545; 5 Ohio St., 528; 23 Mo., 353; 7 Ga., 473; 4 Minn., 309.
[10] 19 Minn., 103.

compelled by mandamus to do even a *ministerial* act.[1] He cannot be compelled by mandamus to return a bill sent to him properly certified by the two houses, for his consideration;[2] nor to issue a certificate so long as any thing remains to be done to entitle the party thereto;[3] and the tendency of the courts is against the existence of the right to interfere in *any* respect with executive action, and the right of authority is against the exercise of any such power. In *People* v. *Governor*,[4] which was an application for a mandamus to compel the governor of Michigan to issue his certificate, showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed according to an act of Congress, making a land grant for the same, and of acts of the legislature of the State conferring the grant upon a corporation which the relator represented, the court denied the writ upon the broad grounds that the court had no power to require the governor to do any act. "When," said COOLEY, J., "duties are imposed upon the governor, *whatever be their grade, importance or nature*, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of State, or a sheriff of a county, or

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[1] 8 Ga., 360; 1 Ark., 570; 2 Bailey (S. C.), 220.

[2] 40 Ill., 126.

[3] 14 Iowa, 162.

[4] 29 Mich., 320; 18 Am. Rep., 89.

other inferior officer, and that, inasmuch, if it had been so imposed, there would have been a judicial remedy, for neglect to perform it; therefore, there must be a like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the governor is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. * * Were the courts to go so far, they would break away from those checks and balances of government which were intended to be the checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."[1] The duties of a

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[1] 1 Ark., 570; 8 R. I., 192; 25 N. J., 331; 32 Me., 510; 19 Ill., 229; 12 Am. Rep., 712; 13 id., 126; 19 Minn., 103; 18 Am. Rep., 330; 24 Tex., 317.

governor are *executive* duties, and the courts cannot interfere with them. SHIPLEY, J., said, "It does not follow that an act cannot be the official act of a department of the government, *because other persons might lawfully have performed the same act*, if performance had by law been intrusted to them. * * *When the performance is by law intrusted to an executive department of the government eo nomine, the performance of the duty is an official act.*" "The judicial and executive departments are made distinct and independent," says BERRY, J., "and as neither is made responsible to the other for the performance of its duties, so neither can enforce the performance of the duties of the other." The attempt on the part of some of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government and in excess of their power, but also attended with great danger. If the courts may interfere with the discharge of *any* ministerial duties of the executive department of the government, they may with all, and we should have the singular spectacle of a government run by the courts, instead of the officers provided by the Constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and State govern-

ments, is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof. If the governor refuses or neglects to discharge his duties, exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him, or to say what he shall or what he shall not do. Whatever may be the *power* of a court, it will exercise it very cautiously when called upon to interfere with the action of the executive officers of the State, and the right of the party to the relief sought must not only be beyond doubt or question, but it must also appear that the officer has no discretionary power over the matter.[1] It lies to compel the secretary of the land office to discharge ministerial duties incident to his office required by law;[2] or to any head of a department to compel the performance of a plain ministerial duty;[3] but *never* to do an act which involves the exercise of discretion, or where there was no authority for doing the act without the aid of the writ.[4] A mandamus lies to compel the board of State canvassers to meet and canvass the

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[1] 3 Fla., 202; 5 Wall. (U. S.), 568; 17 How. (U. S.), 284; 17 id., 225; 12 Pet. (U. S.), 524.

[2] 1 S. & R. (Penn.), 87.

[3] 5 Tex., 471.

[4] 4 Cal., 177.

votes of the State in a purely ministerial capacity when so required by statute, and the fact that they have previously met and canvassed the votes in a judicial capacity, and issued their certificates of election, is not a bar to the remedy.[1] So, it lies to compel the board of canvassers to give a certificate of election to one who is legally entitled thereto, even though the certificate has been given to another, and such other person is actually in possession of the office, and the petitioner might be compelled to resort to a writ of *quo warranto* to remove him therefrom.[2] But *contra*, see *The People* v. *New York*,[3] in which it was held that where another person is in the possession of an office, before a mandamus cannot issue to admit another person thereto, but that he must first be removed by *quo warranto*.[4] *In Ellis* v. *County Comm'rs*,[5] it was held that a mandamus would lie to compel a board of canvassers to certify that the petitioner had a majority of votes cast for county treasurer, even though they had issued their certificate to another person. But *contra*, see *Grier* v. *Skackleford*.[6]

A justice of the peace may by mandamus be com-

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[1] Sup. Ct. Fla. Dec., 1876.

[2] 20 Pick. (Mass.), 484; 4 Term Rep., 699; 3 H. & M. (Va.), 1; 6 Dane's Abr., 335.

[3] 3 Johns. Cas., 79.

[4] 43 Mo., 256.

[5] 2 Gray (Mass.), 370.

[6] 3 Brev. (S. C.), 491; id., 264.

pelled to make a true record of a judgment rendered by him, and to furnish a copy to a party entitled thereto when demanded.[1] So where a county clerk, or other officer having charge of a corporate seal, issues a document and neglects to attach his seal thereto, and goes out of office, his successor may be compelled to affix the seal; and in such case a demand is not necessary to create the duty, but only as a preliminary step to the enforcement of the remedy.[2] So a clerk may be compelled to give copies of records, to permit an inspection of records, to make records, file papers, and generally to do any act required by law.[3] So a sheriff may by mandamus be compelled to perform any duty required of him by law.[4] Bonds, mortgages, or other securities deposited with a State treasurer under a law held unconstitutional, are in his official custody and he is responsible for their safe-keeping and return to the makers, when demanded, and upon his refusal to do so he may be compelled to deliver them by mandamus.[5] A State treasurer cannot be required to make a distribution of funds, as required by statute, until the funds are in his hands.[6] A mandamus will lie against a State auditor to issue a

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[1] 38 Conn., 105.
[2] 34 Iowa, 175.
[3] 3 Abb. (N. Y. App. Dec.), 491.
[4] 2 Neb., 7.
[5] 24 Mich., 468.
[6] 24 La Ann., 12.

warrant for money due from the State under a contract, and to compel the State treasurer to countersign and deliver the warrant to the person entitled thereto, even though there are no moneys to pay the same in the treasury.[1] Where a city council is required by law to collect a tax upon the real and personal property of the city sufficient in amount annually to pay off the interest upon bonds issued by the city in payment of a subscription of stock to a railroad company, and the council refuse to do so, and there is no specific legal remedy provided for non-performance, mandamus may be maintained to compel them to discharge that duty, at the instance of holders to whom the bonds have been passed by the company. An express refusal, in terms, is not necessary to put the defendants in fault; it will be sufficient that their conduct makes it apparent that they do not intend to do the act required. Any of the bondholders may apply for the writ, and it is not necessary that the others should be made parties. Nor is it necessary to make the railroad company to whom the bonds were executed, the tax payers of the city, or the Commonwealth parties to the proceeding. That an action had been brought against the city upon the interest coupons, which was dismissed before judgment

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[1] 58 Ill., 90.

upon the mandamus, forms no obstacle to the granting of the writ.[1] But when the act under which the assessment is to be made is for any reason void or inoperative, mandamus will not lie to compel the doing of any act under it.[2] A mandamus requiring a municipal corporation to provide for the payment of the interest on its bonds need not set forth when the principal will become due, nor when nor where the interest is to be paid; nor is it necessary that the relator's title to the bonds should be set forth; the averment of his ownership is sufficient to show his right to ask the interference of the court by mandamus. The ownership of the bonds necessarily includes the ownership of the right to the interest secured by them and of the coupons attached, which are part of the securities. An averment that the defendants have refused to make any provisions for the payment of the interest is sufficient, without showing that a demand was made upon them to do so. The grant of the power to assess and collect taxes for the payment of the interest on the bonds imposes upon the defendants the duty of exercising such power. It is a sufficient averment of the want of other legal remedy, that the relator distinctly asserts that he cannot have adequate relief without the aid of a writ

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[1] 2 Metc. (Ky.), 56. [2] 36 N. Y., 224.

of mandamus. A mandamus to compel the assessment and collection of a tax for the payment of the interest on bonds issued by the city of Pittsburgh is properly directed to the individuals composing the select and common councils of the city. It is not sufficient, in the return, to aver that the bonds were not transferred in accordance with the acts of assembly; the defendants must show wherein the supposed illegality of the transfer consists. The grant of power to assess and collect a tax for a particular purpose is a repeal, *pro tanto*, of all prior statutory restrictions upon the exercise of the power of taxation. An averment, in the return, that the liability of the city upon the bonds is disputed, is not sufficient to prevent the issuing of a peremptory mandamus; the defendants must obey the writ, or show facts from which the court may determine that the debt is not due; or, at least, that it is doubtful whether it be due. The pendency of a suit upon other bonds than those of the relator is not material, in the absence of any averment of facts which, if true, would amount to a defense.[1] A proceeding, commenced by a public officer in his official character, does not abate either upon his death or removal from office, but is continued by his successor.[2] Where a duty arises from a public statute,

[1] 34 Penn. St., 496.

[2] 2 Head (Tenn), 650.

it is sufficient to state the facts from which the duty arises, and in that event the petition will be good even though the statute is not referred to.[1] A command to audit a claim is not a command to allow it.[2]

In all cases the peremptory writ must follow the rule absolute and the alternative writ, and if the peremptory writ commands the doing of acts beyond those required in the alternative writ and rule absolute, it will be quashed. It cannot be extended beyond the order granting it, and if it does it is wholly inoperative and void;[3] neither should it embrace *any* matters that go beyond the legal obligation of the defendant, *as in that case* the whole writ not only *will* but *must* be set aside. If there is any *essential* variance between the alternative and peremptory writ, the later will be set aside. But when the variance is in *immaterial* matters, and in substance the two writs command the doing of the same act, and the variance does not impose any additional burdens upon the defendant, and relates to an act which the defendant by law is under obligation to do, the peremptory writ will not be set aside.[4] Generally a relator, in order to entitle himself to a peremptory writ of mandamus, must clearly establish his right to have *all* the things

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[1] 7 Clark (Iowa), 686.
[2] 11 Cal., 42.
[3] 6 Ad. & El., 355; 16 id., 19.
[4] 58 N. Y., 153.

done that are specified in the alternative writ. *But where the writ conforms to the legal obligation of the defendants and does not exceed them,* it will not be quashed, even though in some immaterial matters it varies from the alternative writ. "I think," said FOLGER, J., in the case last referred to, "that the rule to be drawn from the authorities is this: That, when the alternative writ, or the rule absolute, has been for the doing of something, to command which there was no power given by statute on which the proceedings were based, that there, the question not being a variation in the detail, or of the exercise of the discretion of the court as to means, but of whether there was or not the power to command the doing of the *substantial* act, the court will not award a peremptory mandamus commanding the doing of *substantially* a different thing." "The peremptory writ must not," continued the learned judge, "materially enlarge the substantial terms of the rule absolute or of the alternative writ, nor exceed them beyond adding merely incidental matters," and he cites numerous English cases in support of his views.[1] The fact that the alternative writ requires the doing of the act in general terms will not prevent the mandatory writ from going into particulars and directing the doing of the act in a specific

[1] 6 Ad. & El., 355; 5 id., 804.

manner, if thereby the burden upon the defendant is not increased and his legal obligation is not exceeded.[1]

To entitle a person to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce;[2] and a refusal or withholding of compliance on the part of the defendant;[3] but the objection that no sufficient demand and refusal appear must be taken before the merits are discussed.[4] As a general rule an applicant for a mandamus must show a demand;[5] but where the duty is imperatively imposed by law, as to levy a tax, a mere neglect to perform the duty is sufficient.[6] When an application is made for a mandamus his interest as well as special reasons for the writ must appear, and, unless a right is disclosed, the writ must be denied.[7] The writ should not command the defendant to do more than he is under a legal obligation to perform, and if it does, it is invalid, and will be quashed. And where it orders several

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[1] 45 N. Y., 196; 51 id., 408. 58 id., 152; 3 Ad. & El., 544; 2 id. 64.,

[2] 4 Ad. & El., (Q. B.), 162.

[3] 3 Ad. & El., 222.

[4] 10 Ad. & El., 531; 15 Ga., 473; 37 Barb. (N. Y.), 466; 34 Penn. St., 277; 25 N. J., 331.

[5] 67 N. C., 330.

[6] 13 Fla., 451; 17 Minn., 429; 7 Rich. (S. C.), 234.

[7] 4 B. & Ad., 901.

things to be done, and is bad in respect of one of the things commanded, it is bad *in toto*. If the petition asks for too much, it must be dismissed. That is, if it asks for more than the defendant is bound to do.[1] A variance in the petition and alternative words is not fatal;[2] but a variance in substance is fatal. If the defendant desires to object on the ground that it is not a corporation, the objection must be plead or it will be treated as waived.[3] The writ may be issued by any court or judge who has power to issue an injunction.[4] Unless the statute provides otherwise a mandamus against a public officer abates at his death, or removal from office.[5] Allegations of conclusions of law, and equivocal pleading is insufficient. The return must set forth matters that show a legal or proper excuse or reason why the doing of the act should not be performed.[6] The cause, after the return to an alternative mandamus, is to be heard on those papers, without referring to the affidavits on which the writ was granted. It may, by consent, be heard without demurrer or traverse.[7] All issues of fact, after an alternative writ is granted, must be tried by jury.[8] A mandamus must be issued only against the

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[1] 2 Hun., 224; 58 N. Y., 295.
[2] 47 How. Pr., 270.
[3] 3 Hun., 361.
[4] 1 Barb., 425.
[5] 17 Wall. (U. S.), 604.
[6] 56 N. Y., 249.
[7] Id.
[8] 5 T. & C., 876.

officer, department or body having authority to do the act. Thus, if a municipal corporation is required by law to do a particular act, the mandamus must be directed to the organ of the corporation that is required to perform it; as if the passage of an ordinance is required, to the common council.[1] It should be directed to those, and those only, who are to obey the writ. Therefore "if the writ be directed to two persons where it ought to be to one only, it is naught."[2] And so it is if it be directed to a corporation in a wrong name;[3] but it may be directed either to the corporation in its corporate name or to those who by the constitution of the corporation ought to do the act.[4] A mandamus to compel the admission to customary or copyhold estates must be directed to the lord and steward jointly, and not to the steward alone, in order that the interests of the lord may be effectually protected.[5] It is at the peril of the person who desires the writ to have it properly directed.[6] A mandamus cannot issue to compel a public officer to perform duties not imposed upon him by law. Thus, a mandamus directing the comptroller of New York city to procure the signature of the mayor, and the corporate seal to be attached to bonds, is erroneous and inopera-

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[1] 3 Keyes, 81.
[2] 2 Salk., 701.
[3] 2 Salk., 433.
[4] 1 Ld. Raym., 559.
[5] 1 Ad. & El. (Q. B.), 366.
[6] 2 Burr., 782.

tive. It should be restricted in its command, simply to those acts which lie in his department, and one personal to himself, to wit: the preparation of the bonds and the affixing of his own signature.[1] The prayer in a petition may be entirely disregarded, and the final order made to conform to the facts alleged and established.[2] The fact that the statute (2 R. S., 587, § 57), providing that where issue is taken upon a return to a writ of alternative mandamus in case a verdict shall be found for the relator, he shall recover his damages and costs in like manner as in an action, and that a peremptory writ of mandamus shall issue without delay, does not apply where the record shows that he has no legal right thereto. And an objection to the relator's right to the relief may be made at any time after a return and before a peremptory writ is granted, or he may show any defect of substance, but after return he cannot object to matters of form.[3] If necessary facts are omitted in the writ, the defect cannot be cured by the return.[4] No amendment is allowed to cure a defect in an alternative mandamus after the return day;[5] but see *State* v. *Gibbs*,[6] where it was held that an *alter navive* mandamus may be

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[1] 39 Barb., 522.
[2] 53 Mo., 156.
[3] 53 N. Y., 128.
[4] 4 H. L. Ca., 471.
[5] 5 Abb. Pr. (N. Y.), N. S., 241.
[6] 13 Fla., 55.

amended, and *Columbia Co.* v. *King*,[1] where it was held that a *peremptory* mandamus *cannot* be amended. In *State* v. *Alderman*,[2] it was held that an alternative mandamus might be amended where the peremptory writ could not issue in the exact terms of the alternative, by striking out immaterial matter. In all cases the proceedings on their face should show a clear right to the relief demanded, and set forth all the *material* facts, so that they may be admitted or traversed.[3] Thus, a petition for a mandamus to county commissioners to compel them to declare a person a commissioner of deeds should aver *affirmatively* that a vacancy existed when the alleged election took place.[4] In order to warrant the issue of a mandamus, the petition should not only aver that the defendant has omitted a manifest duty, and contain all necessary affirmative allegations, but should also contain an averment that other facts, which would constitute an excuse, do not exist.[5] But though the statement is defective, if the claim is valid, and is sustained by the evidence, and the facts so appearing would support the claim to the writ, the defect is cured by the verdict.[6] The writ may be questioned by

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[1] 13 Fla., 451.

[2] 1 Sc., 30.

[3] 10 Wis., 518; 11 id., 17; 12 Ill., 248; 33 id., 9.

[4] 50 Me., 243.

[5] 25 Me., 333; 4 Nev., 400; 14 Mich., 28; 10 Wend. (N. Y.), 25.

[6] 2 H. L. Cas., 419.

showing that the title set out does not warrant the mandatory part of the writ. Thus, if there is any discretion to be exercised as to the time when a thing is to be done, or if the time or mode of performance is conditional, or dependent upon a contingency, a writ commanding the doing of the thing at once, without giving any discretion, or providing for the contingency, will be defective.[1] So where an act of Parliament directs one or other of two things to be done, the party who is to do the act has the option of doing which thing he pleases. A writ of mandamus, therefore, founded on the statute, and failing to give the election, is invalid, unless it assigns some sufficient reason why the party is no longer to have his election.[2] The writ may be general in its terms, showing what ought to be done by the defendants, and what is required to be done by them, *but the return to the writ must be particular and minute.*[3] A writ of mandamus to a corporation or chartered company, to compel the payment of a sum of money, should show on the face of it that the remedy by way of action or distress, for the recovery of the money, is not available.[4] The writ may be served by delivering a copy of the writ, *but the original ought to be shown* to each party served.[5] Strictly the writ

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[1] 31 L. J. Q. B., 50.
[2] 4 H. L. Cas., 471.
[3] 1 B. & S., 5.
[4] 3 B. & Ald., 24.
[5] 1 El. & Bl., 273; 4 Cow. (N. Y.), 93; 19 Ill., 415; 7 Wend. (N. Y.), 536; 1 How. Pr. (N. Y.), 114.

should be served by giving the original writ to the defendant, and if there is more than one defendant, copies should be given to the others, as a part of the command is that the writ shall be returned ;[1] but it may be served by copy, although the proper way is to deliver the original writ.[2] It must be properly directed.[3] A mandamus served without having the seal of the court attached thereto is a nullity, and no proceedings for contempt can be founded thereon.[4] A mandamus cannot be issued, even when the parties consent thereto, to compel the doing of those things to which, by law, the writ does not extend, as to compel the payment of a claim by the Lord of the treasury.[5] When the mandatory part of a mandamus goes beyond the legal duty of the defendant, it is bad altogether ;[6] In *Reg.* v. *Lichfield* ;[7] the order embraced a period during which the yearly sum required by the order to be paid, did not apply, and it was held that, for this reason, the order was bad, and a nullity. A mandamus may be in the alternative and require the defendant to do one of several things, if the duty is one enjoined by statute and there has been a general refusal to comply with such requisition.[8]

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[1] 6 Phil. (Penn.), 121.
[2] 20 Ark., 337.
[3] 2 Burr., 782.
[4] 3 T. & C., 461.
[5] (Lord), 16 Q. B., 357.
[6] 3 Ad. & El., 535 ; 14 Q. B ; 16 id., 191.
[7] 16 id., 781.
[8] 8 Ad. & El., 889.

Where a mandamus has been served by copy, and there is a variance between the copy and the writ, it may be corrected upon application to the court, and the defendant may be required to respond to the parts as stated in the petition and writ. The true way, however, to serve a writ is by delivering the original and retaining a copy.[1] The answer of the defendant may be traversed, and the court has power to hear evidence for and against its statements and determine all questions of law.[2] A mandamus against a city council is virtually a proceeding against the corporation, and the judgment is obligatory on the members in office at the time of its rendition, and a change of membership does not change the proceedings so as to abate the writ. The constituent parts of the board may not be the same, *but the* representative body remains the same. The proceedings only assume a personal or individual character when attachment for contempt is necessary to enforce the order.[3] If a party seeking a remedy by mandamus elects to rest his case upon the affidavits, the answering affidavits, that are neither traversed, nor confessed, nor avoided, will be taken as true. If he desires to controvert or avoid them he should take an alternative writ, so

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[1] 20 Ark., 337.

[2] 2 Metc. (Ky.), 56.

[3] Id.

that, upon answer and return, the questions of fact can be tried.[1] Where a necessary fact is omitted in the writ, the defect cannot be cured by the return.[2] The mandatory part of a writ may be very general, but the return must be very minute in showing why the party did not do the act commanded.[3] The return may show any number of causes why the writ is not obeyed, if the causes assigned are consistent;[4] but if they are inconsistent, the whole return is bad.[5] When the right of the relator to relief prayed for is doubtful, it furnishes a good excuse to the defendant for not doing the act sought to be enforced. Thus, when the relator was removed from the office of clerk of the District Court by the justice thereof, wrongfully, as he claimed, and another was appointed in his place, and discharged the duties of the office under color of law, and the language of the statute was so ambiguous as to be difficult of interpretation, it was held that the title to the office should not be determined in proceedings for a mandamus, and consequently that the justice could not thereby be compelled to give the relator a certificate for the payment of his salary during the period that the person appointed in his

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[1] 55 N. Y., 108.
[2] 4 H. L. Cas., 471.
[3] 1 B. & S., 5.
[4] 4 Burr., 2041.
[5] 4 Burr., 2008.

place had filled the office and discha
and the court also intimated that the
should *never* be tried collaterally on
mandamus.[2]

Prohibition.

The writ of prohibition is issued to prohibit a court and party to whom it is directed, from proceeding in a suit or matter depending before such court, upon the suggestion that the cognizance of such suit or matter does not belong to it. The office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial and not ministerial power,[3] and should not be issued where there are other perfectly adequate remedies.[3]

This writ can be issued only by the Supreme Court,[4] and is to be issued upon affidavits, by motion, in the same manner as writs of *mandamus*. The Superior Court of the city of Buffalo, has, within that city, concurrent jurisdiction with the Supreme Court to issue such writ.[5] It is granted or denied in the discretion of the court.[6]

The writ of prohibition does not lie to a ministerial

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[1] 55 N. Y., 27.
[2] 5 Hill, 216.
[1] 2 Hill, 367; 1 id., 201; 19 Wend., 154.
[2] 2 R. S., 587, § 61; 2 N. Y., S. at L., 609.
[3] 1 L., 1857, 752.
[4] 2 Hill, 367.

officer, to stay the execution of process in his hands,[1] nor does it lie to prohibit the exercise of ministerial power on the part of a judicial officer. Thus, it does not lie to prohibit the issuing of an execution, which is a ministerial power.[2]

Where the court has erred in the decision of a matter within its jurisdiction, the remedy is by appeal, error, or *certiorari*, as the case may be; and not by prohibition.[2]

The writ when issued, is directed to the court and party, commanding that they desist and refrain from any farther proceedings in the suit or matter specified therein, until the next term of the said court, and the further order of the said Supreme Court thereon, and that they then show cause, why they should not be absolutely restrained from any further proceedings in such suit or matter.[3] When served, it stays both the court and the party from proceeding in the matter or suit.[4]

The writ is served upon the court and party to whom it is directed, in the same manner as a writ of *mandamus*;[9] and the return thereto is also to be made by the court in the like manner; which return may be enforced by attachment.[5]

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[1] 1 Hill, 195; 7 Wend., 486. S. at L., 609.
[2] 2 Hill, 367.
[3] 2 R. S., 587, § 61; 2 N. Y.
[4] 7 Wend., 518; 19 Id., 154.
[5] 2 R. S., 587, § 62, *ante*.

After the return to the writ has been filed, the party making the return may serve a notice upon the relator, requiring him to demur or plead thereto within twenty days after such service,[1] and if no plea or demurrer is interposed within the time required, either party may notice the matter for hearing at the next or any subsequent special term at which the same, according to the practice of the court, may be heard, as a non-enumerated motion, and will be heard and disposed of on the said return.[1]

If the party to whom such writ of prohibition is directed, by an instrument in writing signed by such party, and annexed to the return of such writ, adopt the return, and rely upon the matters therein contained as a sufficient cause why such court should not be restrained as mentioned in the writ, such party is thereupon to be deemed defendant in such matter; and the person prosecuting such writ may then reply, take issue, or demur to the matters so relied upon, and the like proceedings are then to be had for the trial of issues of law or fact joined between the parties, and for the rendering of judgment thereupon, as in personal actions.[2]

But when the party to whom such writ of prohi-

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[1] Supreme Court, Rule 51, 1858.

[2] 2 R. S., 587, § 62.

bition is directed does not adopt such return, then the party prosecuting brings on the argument of such return, as upon rule to show cause; and he may, by his own affidavit and other proofs, controvert the matters therein set forth.

Judgment. The court, after hearing the proofs and allegation of the parties, renders its judgment, either that a *prohibition absolute*, restraining the said court and party from proceeding in such suit or matter, do issue, or that a writ of *consultation*, authorizing the court and party to proceed in the suit or matter in question, be issued.[1]

So also, where the party has adopted the return of the writ as before stated, if the court renders judgment for the party prosecuting, a prohibition absolute issues; but if for the defendant, a writ of consultation is awarded.[2]

Amendments of the writ and of the pleadings may be made, by leave of the court, as in the proceedings by mandamus.[3] Costs are also awarded, in the discretion of the court,[6] and are to be at the rate allowed for similar service in civil actions.[4]

Appeals may be taken from the decision of the court at special term, to the general term, the same as in

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[1] Idem, § 64.

[2] Idem, § 65.

[3] 2 R. S., 425, § 10.

[4] Laws 1854, 592, § 3.

mandamus; also from the general term to the Court of Appeals.[1]

Prohibition.

A writ of prohibition lies only to restrain *a judicial* act. If the act sought to be restrained is purely ministerial, it will not lie;[2] *but all acts, based upon a decision, judicial in its nature, and affecting either a public or private right, are judicial acts.*[3] It is a proper remedy when a judge or court attempts to proceed in execution of a judgment after an appeal is taken.[4] It lies in some cases to restrain the proceedings of courts of criminal jurisdiction, or to prevent a coroner holding an inquest, from extending his inquiries beyond the proper limits of his jurisdiction. The writ does not lie to restrain the institution of a threatened suit, but only one already commenced, nor to restrain any threatened judicial act unless a part of the proceedings of an action already instituted; but if the act is judicial, and can be performed without the existence of an action, it is otherwise. Hence, if the act will be illegal and in excess of the lawful jurisdic-

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[1] Code, § 11; §§ 190–192, 194, N. C.; Laws 1854, 592; 19 Barb., 658.

[2] 39 L. J. Q. B., 249; 42 Mo., 133; 13 Minn., 244; 1 Hill, 195; 2 Ired. (N. C.), 183.

[3] 8 Q. B., 75; 12 id., 960; 14 id., 854.

[4] 21 La. An., 113; id., 123.

tion of the person or body upon whom its execution rests, a writ of prohibition may issue to restrain the doing of it at all. Thus, it lies where an act of the legislature, which was unconstitutional, provided for the appointment of commissioners to carry into effect an act authorizing a town to borrow money and *donate* it to a railroad company, which act required him to appoint such commissioners under his hand and seal, upon application to three freeholders of the town, it was held that this was a judicial act, to restrain which a writ of prohibition was the proper remedy.[1] It will not be issued to restrain an act which can be disposed of on an appeal, or other method of review.[2] It is a remedy to restrain an inferior tribunal from doing an illegal act beyond its jurisdiction, where there is no remedy by *certiorari* or other adequate proceeding.[3] It lies to restrain an *unauthorized* act, even where the court has jurisdiction;[4] but not where their proceedings are merely erroneous;[5] or are subject to review by *certiorari;*[6] or other adequate remedies;[7] nor does

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[1] 51 Barb. (N. Y.), 312.

[2] 11 Mich., 393.

[3] 7 Wend. (N. Y.), 418; 27 How. Pr. (N. Y.), 14; 49 Barb. (N. Y.), 351; 36 id., 341; 8 Dallas (U. S.), 121.

[4] 20 N. Y., 531; 51 Barb. (N. Y.), 312.

[5] 2 Hill (N. Y.), 363.

[6] 42 How. Pr., 157.

[7] 31 id., 237.

it lie to a merely *ministerial* officer.[1] It only lies to *prevent* the doing of an act, and can *never* be used as a remedy for acts already done.[2] It will not lie to restrain executive or administrative officers;[3] nor merely ministerial acts of a judicial tribunal;[4] nor to arrest the proceedings of a board of supervisors, unless they are acting in excess of their powers;[5] nor to restrain proceedings in a cause over which the court has jurisdiction.[6]

The writ cannot be issued to prohibit those who are *de facto* in posession of a public office from exercising its functions during the pendency of proceedings to determine his title thereto.[7] The writ is only granted upon petition and after a rule to show cause, and never upon *ex parte* motion;[8] and can only operate upon a pending suit, and cannot be used to prevent the institution of an action.[9] It cannot be issued to prevent an act which the court has legal power to exercise.[10] Its office is to restrain an inferior tribunal from taking cognizance of a matter beyond

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[1] 1 Hill (N. Y.), 195; 41 Mo., 44.
[2] 4 Wall. (U. S.). 158.
[3] 33 Wis., 93.
[4] 46 How. Pr. (N. Y.), 7.
[5] 47 Cal., 81.
[6] 2 Metc. (Mass.), 296; 5 Dana (Ky.), 18.
[7] 2 Ired., 183.
[8] 3 Brev. (S. C.), 83; 4 Pike (Ark.), 537.
[9] Dudley (Ga.), 221.
[10] 5 Pike (Ark.), 21.

its jurisdiction; and it is to this question, upon an application for the writ, that the court will direct its attention. The fact as to whether the court acted *rightly* or not is not open to inquiry. If it has jurisdiction, the writ cannot issue, however wrong or erroneous the action of the court may be.[1] It lies to a court of criminal as well as civil jurisdiction;[2] and it can only operate to prevent a court or judicial body from *proceeding*, and not from exercising its lawful jurisdiction;[3] and it will not be issued where the question of jurisdiction is doubtful and the remedy would result in public inconvenience;[4] nor to correct mere errors or irregularities;[5] but it will lie when the court, although having jurisdiction, proceeds to do an unlawful and unauthorized act.[6] And before the writ will lie, a plea to the jurisdiction must first be interposed and overruled;[7] and the party must be given an opportunity to show cause why it should not issue.[8] When it appears that the case is no longer pending the writ will not be granted, although the

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[1] 7 S. & M. (Miss.), 623; 49 Barb. (N. Y.), 351; 16 C. B. (N. S.), 396.

[2] 3 El. & Bl., 113.

[3] 43 Barb. (N. Y.), 278; 36 id., 341; 19 Abb. Pr. (N. Y.), 136; 27 How. Pr. (N. Y.), 14.

[4] 31 How. Pr. (N. Y.), 237.

[5] 36 Barb. (N. Y.), 341.

[6] 20 N. Y., 531.

[7] 26 Ark., 53.

[8] 25 Ark., 567.

final disposition of it was made after the service of the rule to show cause why the writ should not issue;[1] nor where there is another or adequate remedy, as by appeal, *certiorari*, etc.[2]

Where a court has rendered a judgment in a cause over which it has no jurisdiction, and execution has issued thereon, but has not been collected, a prohibition will issue to prevent its collection.[3] But if the court had jurisdiction over the cause, the mere fact that it has exceeded its authority in a portion of its judgment will not warrant the issue of a writ of prohibition.[4] When the court usurps jurisdiction this is not only the *proper* but it is the *only remedy*.[5]

In order to authorize the issue of the writ the petition should clearly show that the inferior court is about to proceed in a matter over which it has no jurisdiction, and this may be done by setting forth any acts or declarations of the court or officer indicative of such purpose;[6] and the mere fact that the opposing counsel has noticed a motion for a hearing before a court commissioner, which such commissioner has no authority to entertain, is not enough, unless it

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[1] 4 Wall. (U. S.), 158; 1 Black (U. S.), 503.

[2] 2 Nev., 75; 11 Wis., 50; 14 Ind., 235.

[3] 1 W. Va., 181.

[4] 43 Barb. (N. Y.), 278.

[5] 16 La. Ann., 185; Chitty's Pr., 1725.

[6] 4 Minn., 369; 14 La Ann., 504.

is also shown that he *intends* to entertain it. Nor can a writ of prohibition be issued in such form as will entitle the parties to join an issue before a jury.[1] A variance between the suggestion aud the declaration is not fatal in bar, and, therefore, is not a good ground of demurrer.[2] But the affidavit (or suggestion) to a petition must set forth either that the affiant has knowledge *or* information concerning the matter stated in the petition, and if there is nothing before the court but the petition and answer thereto, the petition will be dismissed if the answer denies the allegations of the petition. The petitioner in such case should traverse the answer.[3] If the writ is issued and disobeyed, the remedy is by attachment for contempt, as in the case of a violation of an ordinary injunction order.[4] A writ of prohibition is a proper proceeding by which to arrest the execution of an illegal judgment.[5] The application for the writ may be made either to the court or to a judge at chambers when the court is not in session.[6] An affidavit should be made setting forth the facts and grounds necessary to support the application;[7] and if a rule for the writ is refused, an appeal may be taken.[8]

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[1] Id; 14 La Ann., 504.
[2] 15 Gratt. (Va.), 528.
[3] 30 Cal., 244.
[4] 38 Mo., 296.
[5] 16 Gratt. (Va.), 270; 21 La Ann., 113; 13 Minn., 493.
[6] L. R., 9 Eq. Cas., 660.
[7] 12 L. J. Q. B., 68.
[8] Chitty's Pr., 1725.

CHAPTER II.

HABEAS CORPUS AND CERTIORARI.

General observations.

The writ of *habeas corpus* is issued to inquire into the grounds upon which any person is restrained of his liberty; and when it is found that the restraint is illegal, to deliver him from such restraint.[1] The statute provides that every person committed, detained, confined, or restrained of his liberty, within this State, for any criminal or supposed criminal matter, or under any pretense whatsoever, except in certain cases therein specified, may prosecute a writ of *habeas corpus*, or of *certiorari*, according to the provisions therein contained, to inquire into the cause of such imprisonment.[2]

The persons not entitled to the writ, are: 1. Persons committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or where exclusive jurisdiction has been acquired by the commencement of suit in such courts; 2. Persons committed or detained by virtue of the

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[1] 3 Hill, 647, note.

[2] 2 R. S., 563, § 21; 2 N. Y. S. at L., 584.

final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon any such judgment or decree.[1]

In general, this writ to inquire into the cause of detention, in all cases, whether under the statute or at the common law, except when issued by the Supreme Court or one of the justices thereof, can only be allowed for the purpose of delivering the person for whose relief it is asked, from illegal imprisonment or restraint. The only exception is in the case of an infant of such tender years, as to be incapable of making a choice for itself.[2]

While the writ of *habeas corpus* is perogative in its character, it is, nevertheless, a writ demandable as of right, on a proper foundation being made out by proof,[3] and it lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause or under whatever pretense; in which respect the statute and common law writs are the same.[4]

This writ frequently issues for purposes connected with the administration of justice, as for the purpose of bringing the body of a prisoner before the court to

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[2] Idem, § 22.

[3] 14 N. Y., 575, aff'g 22 Barb., 179, 188; 1 Duer, 709, &c.

[4] 3 Hill, 649, note.

[1] 2 R. S., 564, §§ 21, 23; 3 Bl. Com., 128–138.

testify, or to be arraigned upon an indictment, or for the purposes of exonerating his bail from liability,[1] &c.

Although the nature of the writ is, like other prerogative writs, appellate in its character, in that it looks to the case only as it is presented upon the return thereof, yet it will not lie to review the judgment or decision of a court or officer having competent jurisdiction.[2] Thus, where the *habeas corpus* showed that the person sought to be relieved was detained under a commitment by a magistrate for contempt as a witness, in refusing to answer questions relating to a criminal complaint, it was held that the officer before whom the writ was returnable had no right to inquire into the truth of the facts adjudged by the committing magistrate, nor whether the questions put to the witness were proper, nor whether he was privileged from answering the same.[3] The officer may inquire whether the process of commitment is valid on its face; or, whether any thing has arisen since the commitment for putting an end to the imprisonment; or, whether the committing magistrate had jurisdiction, &c.,[3] even though the necessary jurisdictional facts are recited in the commitment;[3] but he

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[1] 7 Wend., 132.

[2] 5 Hill, 164; 22 Barb., 178.

[3] 5 Hill, 164; 2 R. S., 567, § 42.

cannot rejudge the judgment of the committing court or magistrate.[1]

The writ of *habeas corpus* is not the proper remedy by which to try the right to the guardianship of an infant,[2] nor to determine the sufficiency of an affidavit upon which an attachment for a contempt is issued.[3] The attachment in such case is issued, in the discretion of the court, upon due proof, and upon which the court is to decide as to its sufficiency.[7] When the court has jurisdiction, both of the person and of the subject matter, the officer issuing the writ of *habeas corpus* cannot, in general, look beyond what appears upon the face of the commitment.[4]

The application for the writ, to whom and how made.

The application for such writ is by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, either to the Supreme Court,* during its sitting; or, during any term or

* The like authority is also given to the Superior Court of the city of Buffalo, and to each of the justices thereof, to issue the writ within the city of Buffalo (Laws 1857, vol. 1, 752); also to the city judge of the city of Brooklyn (Laws 1849, 174, § 26); and to the city judge of the city of New York, within that city. (Laws 1850, 388; 6 Abb., 139, 146.)

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[1] Per BRONSON, J., 5 Hill, 168, citing 9 Wend., 220.

[2] 8 Paige, 47.

[3] 2 Sandf., 724.

[4] See 1 Hill, 159; 2 Sandt., 729.

vacation of such court, to the chancellor, or any one of the justices of the Supreme Court, or any officer who may be authorized to perform the duties of a justice of the Supreme Court at chambers,† being or residing within the county where the prisoner is detained; or, if there be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or having refused to grant such writ, then to some officer having such authority residing in any adjoining county.[1]

And whenever an application for any such writ is made to an officer not residing within the county where the prisoner is detained, he must require proof, by the oath of the party applying, or by other sufficient evidence, that there is no officer in such county authorized to grant such writ, or, if there is such an

† The officers authorized to perform the duties of justices of the Supreme Court at chambers, under the Revised Statutes, were Supreme Court commissioners (2 R. S., 280), which office was abolished by the Constitution of 1846 (art. 14, § 8); the judges of the Superior Court of the city of New York (2 R S., 281, § 33); the judges of the Court of Common Pleas for the city and county of New York (Laws 1847, 281, § 7); the recorders of cities and judges of the County Courts, being of the degree of counselor at law. (2 R. S., 281, § 32; see also 3 How., 32, 40, 172.) The authority of the chancellor to award a *habeas corpus* was transferred to the justices of the Supreme Court by the judiciary act and the Constitution of 1846.

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[1] 2 R. S., 563, § 23; 2 N. Y. S. at L., 584.

officer, that he is absent, or has refused to grant the writ, or for some cause, to be specially set forth, is incapable of acting.[1]

The restriction that the application for such writ must be to an officer residing within the county where the prisoner is detained, applies only to that class of officers designated as "authorized to perform the duties of a justice of the Supreme Court at chambers."[2] Where the application is made to the Supreme Court or to any one of its justices, it may be made in any county in the State, without reference to the place of the detention of the prisoner;[3] and when the application is thus made in a county other than the one where the prisoner is detained, such court or judge, in its discretion, may make such writ returnable before some officer authorized to issue such writ, in the county where the prisoner is detained.[3] But the city judge of the city of Brooklyn has no power to issue such writ running into another county, without proof that there is in such county, no officer authorized to grant the writ.[4]

The statute has provided what, in substance, the petition shall contain. It must state: 1. That the

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[1] 2 R. S., 564, § 24; 8 Abb., 188.

[2] 8 Abb., 190; 3 How., 39.

[3] 8 Abb., 190; 3 How., 39; Laws 1837, 230; 4 N. Y., S. at L., 681.

[4] 8 Abb., 190.

person in whose behalf the writ is applied for, is imprisoned or restrained in his liberty; the officer or person by whom he is confined or restrained, and the place where; naming both parties when their names are known, or describing them if they are not known; 2. That such person is not committed or detained by virtue of any process issued, or judgment or decree rendered, by any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon any such judgment or decree; 3. It must also set forth, according to the best knowledge and belief of the applicant, the cause or pretense of such confinement or restraint; 4. The statute also imposes upon the Supreme Court, and its several justices, the duty of issuing the writ of *habeas corpus* in certain cases, even though no petition has been presented or application has been made for such writ. This is required when they shall have evidence, from any judicial proceeding had before them, that any person within the county in which such court or officer shall be, is illegally confined and restrained of his liberty.[1]

Form of the writ. The statute also prescribes the form of the writ to be used. It is issued in the name of the people of the State of New York, and is directed to the person or officer by whom the prisoner is de-

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[1] Idem, 565, § 30.

tained, commanding him to have the body of the prisoner, together with the time and cause of such imprisonment and detention, by whatsover name the prisoner shall be called or charged, before the justices of the Supreme Court, or some officer, &c., as the case may be, forthwith, or at a specified time to be named therein, &c.[1] The writ may also be directed to any person who is charged with participating in the illegal detention of the prisoner, though he may not be the immediate actor.[2] The writ should state the place of the return as well as the officer or court before whom it is returnable.[3]

If the confinement or restraint is by virtue of any warrant, order or process, a copy thereof must be annexed; or it must be averred, that by reason of such prisoner's being removed or concealed before the application, a demand of such copy could not be made, or that such demand was made, and that legal fees therefor were tendered to the officer or person having such prisoner in his custody, and that such copy was refused. 5. If the imprisonment be alleged to be illegal, the petition must also state in what the alleged illegality consists; 6. It must specify whether the party applies for the writ of *habeas corpus*, or for the

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[1] 2 R. S., 565, § 27; see form in the statute.

[2] See 3 Hill, 406.

[3] 2 R. S., 574, § 75.

writ of *certiorari;* 7. And it must be verified by the oath of the party making the application.[1]

When the object of the writ is to determine the rightful custody and disposition of an infant, the application should be made to the Supreme Court or to one of its justices. The application, in such case, is at the common law, and not under the statute; unless the proceeding is upon the application of the husband or wife, made under the statute, representing that the wife or her husband has attached him or herself to the society of shakers, and detains a child of the marriage between them, &c.[2] A judge of the Superior Court of the city of New York is not clothed with the discretionary powers of a judge in equity, in relation to the custody and disposition of infants.[3] Nor is a recorder of a city, a county judge, or a judge of the Court of Common Pleas of the city and county of New York; nor is a justice of the Supreme Court, in respect to the statutory writ of *habeas corpus,* returnable before him at chambers, clothed with such discretionary powers. In such cases, the petition must be addressed to the Supreme Court in equity, and then it may be presented to a justice thereof, at chambers, out of term, and such justice would have power to entertain such proceeding.[4]

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[1] 2 R. S., 564, § 25; 2 N. Y. S. at L., 585.

[2] 2 R. S., 149, § 4.

[3] 1 Duer, 709; 8 How., 288.

[4] 22 Barb., 179; 14 N. Y., 575.

The statute also provides that any court or officer empowered to grant any writ applied for under that act, to whom such petition shall be presented, shall grant the writ without delay; unless it appear from the petition itself, or from the documents annexed, that the party applying therefor is, by the provisions of the statute, prohibited from prosecuting such writ.[1] And if any court or officer, thus authorized to issue such writ, refuse to issue the same, when legally applied for, every member of such court assenting to such refusal, and every such officer, severally, forfeits to the party aggrieved the sum of one thousand dollars.[2]

Seal of what court. The statute also provides that the writ must be under the seal of the court by which it is awarded; and when awarded by an officer out of court, then, under the seal of the court before which the writ is made returnable; and, if made returnable before some body other than a Court of Records, or before an officer out of court, then it is to be under the seal of the Supreme Court.[3]

The indorsement. The writ must also be indorsed with a certificate that the same has been allowed, together with the date of its allowance. When the

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[1] 2 R. S., 564, § 26.

[2] Idem, 565, § 31.

[3] 2 R. S., 574, § 74; 2 N. Y. S. at L., 594.

writ is awarded by the court, the indorsement must be signed by the chief justice or other presiding officer of such court; if awarded by an officer out of court the indorsement must be signed by such officer; and whenever the writ is required in an action or matter to which the people of the State are parties, on the application of the attorney-general, or district attorney having charge of the same, the fact that it was issued upon such application must be stated in their indorsement of the allowance.[1] So, when the charges for bringing up the prisoner are to be paid by the petitioner, the indorsement of the allowance must also specify the amount of such charges to be paid.[2] The officer bringing up the prisoner may require his charges therefor to be paid by the petitioner, if so allowed by the court or officer granting the writ. Such allowance may be had, when the writ is to be directed to any other than a sheriff, coroner, constable or marshall.[3]

This writ may be amended, on motion, like other processes, in the discretion of the court.[4]

The statute, having given the general form of the writ, provides further, that a defect of form, in the writ, will not excuse a disobedience thereof. That

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[1] Idem, § 77.
[2] Idem, § 84.
[3] 2 R. S., 575, § 84.
[4] 3 Hill, 657, note, &c.

the person having the custody of the prisoner may be designated either by his name of office, if he have any, or by his name; or, if both such names are unknown or uncertain, then he may be described by an assumed appellation; and that any one who may be served with the writ shall be deemed the person to whom it is directed, although it be directed to such person by a wrong name or description, or to another person. So, also, if the person directed to be produced be designated by name; or if his name be uncertain or unknown, he may be described in any other way, so as to designate the person intended.[1]

The form of a writ of *certiorari*, to be issued in pursuance of these provisions, is also given in the statute.[2]

How and by whom the writ to be served.

The statute provides that the writ of *habeas corpus* can only be served by an elector of some county within the State; and to be deemed complete service, the party serving the same must tender to the person in whose custody the prisoner may be, if such person be sheriff, coroner, constable or marshal, the fees allowed by law for bringing up such prisoner; nor, unless he shall give bond to the sheriff, coroner, &c.,

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[1] 2 R. S., 565, § 29. [2] R. S., 565, § 28.

as the case may be, in a penalty double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money; and, if not, then in the penalty of one thousand dollars, conditioned that such person will pay the charges of carrying back such prisoner if he shall be remanded, and that such prisoner will not escape by the way, either in going to, or returning from, the place to which he is to be taken.[1] These provisions, however, do not apply to any case where the writ is sued out by the attorney-general or district attorney.[2]

The writ is served by delivering the same to the person to whom it is directed, and if he cannot be found, it may be served by being left at the jail or other place in which the prisoner may be confined, with any under officer, or other person of proper age, having charge, for the time, of such prisoner.[3] And if the person upon whom it ought to be served, conceal himself or refuse admittance to the party attempting to serve the same, it may then be served by affixing the same in some conspicuous place, on the outside, either of his dwelling house or of the place where the party is confined.[4]

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[1] 2 R. S., 574, § 78; 2 N. Y. S. at L., 595.

[2] Idem, § 79.

[3] 2 R. S., 574, § 78; 2 N. Y. S. at L., 595, § 80.

[4] 2 R. S., 575, § 81.

After such writ has been thus served upon any sheriff, coroner, constable or marshal, whether the same was directed to him or not, and upon the payment or tender of the charges allowed by law, and the delivery or tender of the bond before described, it becomes his duty to obey and return the same, according to the exigency thereof; and so, likewise, if it be served upon any other person having the custody of the individual for whose benefit it was granted, it becomes the duty of such person to obey and execute such writ according to the command thereof, without requiring any bond, or the payment of any charges, unless the same had been previously required by the officer granting the writ.[1]

It is likewise the duty of the person upon whom the writ of *certiorari*, issued in pursuance of these provisions, shall have been served, and upon the payment or tender of fees allowed by law for making a return to such writ, and for copying the warrant or other process to be annexed thereto, to obey and return the same according to the exigency thereof.

Proceedings in case of disobedience.

If the party served refuses or neglects to obey the same, by producing the party named in such writ of *habeas corpus*, and making a full and explicit return

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[1] Idem, § 82.

thereto within the time therein required, and show no sufficient execuse for such neglect or refusal, it then becomes the duty of the court or officer before whom such writ is made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person, directed to the sheriff of any county within the State, commanding him forthwith to apprehend such person, and bring him immediately before such court or officer.

And on such person being so brought before the court, &c., he shall be committed to close custody, in the jail of the county in which such court or officer shall be, without being allowed the liberties thereof until he make return to such writ, and comply with any order that may be made by such court, &c., in relation to the person for whose relief such writ was issued.[1] If the sheriff has been guilty of such neglect, the attachment may be directed to the coroner or such other person as may be designated therein, who will have full power to execute the same, and the sheriff may be committed to the jail of any county except his own.[2] In addition to the attachment thus directed, a precept may likewise be issued at the same time, to the same officer or other person, commanding him to bring forthwith before the court or officer the party

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[1] 2 R. S., 566, § 34. [2] Idem, § 35.

for whose benefit the *habeas corpus* was issued, and such person shall remain in the custody of the person holding such precept, until he be discharged, bailed or remanded, as the court or officer shall direct.[1] In the execution of the attachment or precept, the power of the county may be called to the aid of the person executing it.[2]

The return of such writ.

Such writ is made returnable at a day certain, named therein, or forthwith, as the case may require.[3] If the writ be made returnable at a certain day, the writ must be returned and be produced at the time and place specified, therein; and if it be returnable forthwith, and the place be within twenty miles of the place of service, the return must be made and the prisoner be produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles.[4]

The person upon whom the writ is served must state in his return, plainly and unequivocally: 1. Whether he has or has not the party in his custody or under his power or restraint; 2. If he has, then the authority and true cause of such imprisonment or

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[1] Idem, § 36.
[2] Idem, § 37.
[3] 2 R. S., 574, § 75.
[4] Idem, 575, § 86; 2 N. Y. S. at L., 596.

restraint, setting forth the same at large; 3. If the party be detained by virtue of any writ, warrant or other written authority, a copy thereof must be annexed to the return, and the original be produced and exhibited on the return of the writ, to the court or officer before whom the same is returnable; 4. If the person upon whom such writ shall have been served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time, for cause, and by what authority such transfer took place; and the return must be signed by the person making the same, and except where such person shall be a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.[1]

Besides this return upon the writ, the body of the person in custody must be produced according to the command of the writ except in case of sickness, &c.[2] And whenever, from sickness or infirmity of the person directed to be produced by such writ, such person cannot be produced before the court without danger, the party in whose custody he is may state that fact, in his return and verify the same by his oath; and

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[1] 2 R. S., 566, §§ 32.

[2] Idem, §§ 38, 49.

the court, being satisfied of the truth of such allegation, will then proceed to examine and dispose of the cause the same as upon *certiorari.*[1] Otherwise, to excuse the non-production of the body, the return must show that the prisoner is neither in the defendant's custody or within his possession or power.[2]

The return may be amended by leave of the court at any time before the decision is made, and it may be amended either in its substance or its form,[3] and it should be amended by the one making the defective return.[4]

Proceedings after the return of the writ.

Notice to other parties. When the return to the writ shows that the party is in custody on any process under which any other person has an interest in continuing his imprisonment, or restraint, no order will be made for his discharge until it is made to appear that the party thus interested, or his attorney has had like notice of the time and place at which such writ was made returnable, as is required to be given of special motions in the Supreme Court.[5] Notice must be given even where the party does not reside in the

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[1] Idem, § 49.

[2] 10 Johns., 328; 3 Hill, 657.

[3] 10 Mod., 102.

[4] 3 Hill, 657, note.

[5] 2 R. S., 569, § 46; see 1 vol., 429, 430; Code, §§ 410, 412 and 413, 797, 798, 780.

county where the party sought to be relieved resides, or where the proceedings is to be had. The party interested is entitled to notice of the proceedings, without regard to his place of residence,[1] although copies of the petition and other papers need not be served upon him.[2] Such interested parties residing in other counties, notice may be served upon them by mail, when the communication is regular between them. In such case, the service is made by enclosing the notice in a wrapper, and putting the same in the post-office, properly directed, and paying the postage thereon.[3]

Where the party is detained upon a criminal accusation, the district attorney must also be notified of the time and place at which such writ is to be returned. The notice must be given to the district attorney of the county in which the prisoner is detained.[4]

The court or officer before whom the party is brought on *habeas corpus*, must proceed immediately after the return thereof to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not.[5] If the facts are not denied,

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[1] 14 Wend., 48.

[2] 12 Wend., 229.

[3] Code, § 410; § 797, N. C.

[4] 2 R. S., 569, § 47 Laws 1837, 231; 5 Hill, 169; 10 Paige, 611.

[5] 2 R. S., 267, § 38.

the law of the case is alone inquired into.[1] But if issue is taken upon material facts in the return, or if other facts are alleged to show the imprisonment to be illegal, or that the party is entitled to his discharge, the court or officer proceeds at once to hear the allegations and proofs, and disposes of the party according to the justice of the case.[2]

If no legal cause be shown for such imprisonment or restraint, or for the continuation of the same, the party must be discharged from the custody or restraint under which he is held.[3] But if it shall appear that he is detained in custody either, by virtue of process issued by any court or judge of the United States, in a cause where such judge or court has exclusive jurisdiction; or by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or for any contempt specially and plainly charged in the commitment, by some court, officer or body having authority to commit for the contempt so charged; and that the time during which such party may be legally detained, has not expired, it becomes the duty of the court or officer making such examination forthwith to remand such party.[4]

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[1] 3 Hill, 658; note pl., 28; 4 Barb., 41.

[2] 2 R. S., 569, § 48. Idem, 567, § 39; 15 Barb., 153; 1 Duer, 709.

[4] 2 R. S., 567, § 40; see 29 Barb., 625; 5 Hill, 167; 19 Paige, 284; 8 How., 480; see also 2 R. S., 44, § 15.

If it appear on the return, that the prisoner is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such prisoner can be discharged only in one of the following cases: 1. Where the jurisdictiou of such court or officer, has been exceeded, either as to *matter, place, sum or person;* or, 2. Where, the original imprisonment being lawful, by some *act, omision or event* which has subsequently taken place, the party has become entitled to be discharged; or, 3. Where the process is defective, in some matter of substance required by law, rendering the same void; or, 4. Where the process, though in proper form, has been issued in a case not allowed by law; or, 5. Where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him; or, 6. When the process is not authorized by any judgment, order or decree of any court, nor by any provision of law.[1]

But on the return of such writ, no court or officer has any power to inquire into the legality or justice of any process, judgment, decree or execution, specified in the twenty-second section of the *habeas corpus* act,[2]

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[1] 2 R. S., 568, § 41; see 29 Barb., 78; 11 Abb., 147; 19 How., 477; 15 Ib., 211.

[2] See 2 R. S., 563.

nor into the justice or propriety of any commitment for a contempt made by any court, officer or body, according to law, and charged in such commitment.[1]

But if, on examination, it appear that the party has been legally committed for any criminal offense, or if, by the testimony offered with the return of the writ, or upon the hearing thereof, he appear to be guilty of such offense, although the commitment be irregular, such party will not be entitled to a discharge; but he may be let to bail, if the offense be bailable and good bail be offered, otherwise he is to be remanded.[2] Being remanded, he is placed under the restraint from which he was taken, unless the person holding him under such restraint was not entitled to do so, in which case he is to be committed to the custody of such person or officer as by law is entitled thereto.[3]

During the examination and before judgment is given upon the return, the prisoner remains in the custody of the sheriff, or other officer or person, as the court shall direct.[4] The officer issuing the writ of *habeas corpus* is not authorized to permit the prisoner to go at large until his decision of the case upon the

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[1] Idem, § 42; 15 Barb., 153 5 Hill, 167; see 2 R. S., 44, § 15.

[2] Idem, § 43; 26 Barb., 80; 1 Sandf., 702.

[3] 2 R. S., 563, § 44.

[4] Idem, § 45; 10 Paige, 610.

return.[1] If the prisoner is imprisoned on execution, the sheriff will be liable for an escape if he voluntarily suffers him to go at large without restraint.[1] It is held, however, that the *habeas corpus* relieves the prisoner temporarily from the duress of imprisonment under the execution, and that he is not then enduring the restraint created thereby with the view of coercing payment.[2] Therefore the sheriff is not bound to keep the prisoner always in sight with the same strictness as before.[2]

What may be inquired into, on the return of the writ, by the court or officer hearing the same.

When it appears, by the return, that the prisoner is detained by virtue of any civil process from any court, legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, and the process is valid upon its face, the presumption will be in favor of the legality of such imprisonment; and the burden of impeaching its legality will be thrown upon the prisoner. But he is at liberty to impeach it, by showing want of jurisdiction in the court or magistrate from whence it emenated,[3] or that the court had exceeded its jurisdic-

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[1] 10 Paige, 606.

[2] 18 Johns., 48; 7 Wend., 132.

[3] 3 Hill, 661, note pl. 31; 1 Sandf., 702; 2 Park. Cr. R., 650.

tion in that particular case, either as to matter, place, sum or person.[1]

The process may also be attacked by showing that there has been some act, ommission or event, which has taken place since the issuing of such process, which entitles the party to be discharged therefrom.[2] The court may also inquire whether the process, though proper in form, was issued in a case legally allowable, or whether it was issued in accordance with any provision of law.[3] Thus, if the defendant has been taken in execution, the court may inquire whether the judgment authorized the issuing of an execution against the body of the defendant; and if not, whether there is record evidence sufficient to justify issuing the same.[4] Thus, where an execution was issued on a judgment rendered in an action against an innkeeper, for the loss of the baggage of his guest, and the defendant was taken in execution, the court held, that on a *habeas corpus* issued to inquire into the cause of the capture and detention of defendant, it might proceed to inquire whether the process, though proper in form, was allowable by the law in the case, and whether it was authorized by a judgment or decree

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[1] 2 R. S., 568, § 41, sub., 1.

[2] Idem, sub. 2; 1 Hill, 337; 25 Wend., 483.

[3] Idem, sub. 4, 6; 3 Hill, 661, note pl., 31, 37.

[4] 26 Barb., 80; 15 How., 211.

of a court, or by a provision of law.[1] And where an order of court was necessary to the issuing of such execution, such order should also appear, or at least, the facts entitling the judgment creditor to such an order should appear to have been established.[1]

But, on such return, the court cannot inquire into the legality or justice of any process, judgment, decree or execution specified in the twenty-second section of the *habeas corpus* act,[2] nor into the justice or propriety of any commitment for a contempt made by any court, officer or body, according to law, and charged in such commitment.[3] Thus, where the return shows that the prisoner is detained under a commitment for contempt as a witness, in refusing to answer questions relating to a criminal complaint, the court has no right to inquire into the truth of the facts adjudged by the committing magistrate, nor as to the propriety of the questions put to such witness, nor as to his privilege from answering the same.[4]

But the question of the jurisdiction of the court committing, is open to inquiry, even where the imprisonment is under the asserted authority of the United States.[5] And the jurisdiction may be inquired

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[1] 26 Barb., 80.

[2] 2 R. S., 563.

[3] Idem, 568, § 42; 2 Park. Cr. R., 650; 16 Barb., 363.

[4] 5 Hill, 164; 11 How., 418.

[5] 3 Hill, 651, note; 6 Johns., 337.

into where the commitment recites the necessary facts to confer jurisdiction.[1]

Under the statute, the party brought before the court on *habeas corpus*, is permitted to deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.[2] It is held that this provision of the statute does not authorize a summary trial as to the guilt or innocence of the prisoner; but only to enable him by evidence *aliunde* the return, to dispute the facts of his detention on the process or proceeding set forth; or to impeach it for lack of jurisdiction; or to show that by some subsequent event, as pardon, a reversal of judgment, &c., it had ceased to be a lawful detention.[3] Accordingly, where the return shows the party to be detained on process, the existence and validity of the process are the only material facts, within this provision of the statute, upon which issue can be taken.[4] Where the process is sufficient to protect the officer and party, the imprisonment is lawful.[4]

In proceedings under this writ, the court or officer is confined to questions of jurisdiction, and to what may be called *prima facie* appearance of the proceed-

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[1] 5 Hill, 164, 168; 5 Abb., 281; 15 How., 210.

[2] 2 R. S., 569, § 48.

[3] 1 Hill, 337; 25 Wend., 483, 570.

[4] 3 Hill, 658, note.

ings, without raising any collateral issues, or impeachments of records, deeds or papers fair on their face.[1] Thus, where a pardon was alleged in answer to a return on a *habeas corpus*, the court cannot go behind the pardon and inquire whether it was fraudulently obtained.[1] BRONSON, J., held that this provision of the statute[2] was intended mainly for cases where the party was restrained of his liberty without the authority of legal process.[3]

Evidence. It is held that the prisoner may prove the writings or document on which his arrest is founded, and what they contain, by the best evidence at hand, or which he can procure with reasonable diligence, without regard to the ordinary rules of evidence.[4] But the prisoner himself is not a competent witness to support the application for his discharge,[5] and the Code has not changed the rule in this respect.[6]

How far the decision on habeas corpus is conclusive on the parties.

Such adjudication is conclusive upon the same parties in all future controversies relating to the same

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[1] 8 How., 488, 483; see 1 Barb., 340, also 193; 1 Park Cr. R., 187.

[2] Code, § 48.

[3] 5 Hill, 168.

[4] Hurd on Hab. Cor., 304; 1 Sandf., 702.

[5] 5 Hill, 17.

[6] Code, § 471; 1 Park Cr. R., 169; 5 N. Y., 383.

subject matter, and upon the same state of facts.[1] But where circumstances have so far changed as to affect the application of the principal of the decision to the particular case, the former proceedings would not be a bar to future action in respect thereto. Thus, when a father obtained a *habeas corpus* for his infant child, detained by its mother, and the court had on several occasions refused to interfere with the custody of the mother on account of the tender age of the child, yet about eighteen months afterwards the court held that the former proceedings were not a bar to the proceedings then being had, by reason of the greater age of the child at that time. That the circumstances had so changed by reason of the greater age of the child as to render it proper that the father's rights should be enforced.[2]

The question whether a proceeding by *habeas corpus* is barred by a previous proceeding, is to be determined by the identity or non-identity of the questions to be settled by such several adjudications.[3]

Concealing the prisoner with intent to elude the service of the writ, penalty therefor.

The statute further provides that any one having in his custody or under his power, any person, who,

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[1] 25 Wend., 64; 1 Park Cr. R., 129.

[2] 8 Hill, 400.

[3] See 3 Park Cr. R., 531.

by the provisions of the statute, would be entitled to a writ of *habeas corpus* or *certiorari*, to inquire into the cause of his detention, who shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control, of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor. So, likewise, doing the same in respect to one for whose relief a writ of *habeas corpus* has issued is made a misdemeanor; or, any one aiding or assisting another in doing the same, is guilty of a misdemeanor, and, on conviction thereof, is to be punished by fine or imprisonment, or both, in the discretion of the court; the fine not to exceed one thousand dollars, and the imprisonment not to exceed six months.[1]

So, also, any officer, or other person, refusing to deliver a copy of any order, warrant, process or other authority by which he detains any person, to any one demanding such copy, and tendering the fees therefor, forfeits two hundred and fifty dollars to the person so detained.[2]

Proceedings in respect to infants.

In cases affecting the custody of infants, it is held

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[1] 2 R. S., 571; §§ 61, 62, 63 and 64.

[2] Idem, § 72.

that the writ of *habeas corpus* is issued at common law and not under the statute, except in certain cases hereinafter noticed.[1] In such cases the court acts in virtue of its equity powers; and a justice of the court, in virtue of his powers as chancellor.[2] The authority of the court in such cases is that which is inherent in a Court of Equity and is derived from the common law, but to be exercised in conformity to the provisions of the statute to the extent they are applicable.[3]

As a general rule, the father is entitled to the custody of his infant children; but he holds this right subject to the supervision of equity,[4] which will award the custody of the infant, in accordance with what the interest and welfare of the infant demand. As between the father and mother, where they are living separate, if the infant be of tender years and the mother be a suitable person to have the custody of it, it will be awarded to the mother.[5] So when the conduct of the father is brutal, or where his principles and habits are immoral, he may forfeit his right to the custody of his child.[6] The wish of the child will

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[1] 1 Duer, 709, 725; 22 Barb., 179; 14 N. Y., 575; 8 How., 288.

[2] 1 Duer, 709; 8 How., 288.

[3] 14 N. Y., 575; 8 Paige, 47; 2 R. S., 573, § 73.

[4] 3 Hill, 400; 18 Wend., 637; 24 Barb., 521.

[5] 25 Wend., 64.

[6] 18 Wend., 637; 19 Id., 16; 24 Barb., 521.

also be consulted when of sufficient age to exercise a proper choice.[1] But where the child is too young to be capable of determining for itself, the court will determine for it, and in doing so, will have respect to the future welfare of the child.[2] Where the child is old enough to understand its own interest, and to have a will in respect thereto, the court will see that it is left free to exercise its own choice.[3] The course and practice of the court in these cases is to deliver the party from illegal restraint; and, if competent to form and declare an election, then to allow the infant to go where or with whom it pleases; but if, in the opinion of the court, the infant be too young to form a judgment, then the court is to exercise its own judgment in that respect.[4]

It is not the object of this writ to try the right of parents or guardians to the custody of infants, but to deliver them from unjust imprisonment and illegal restraint; when, therefore, the infant has been brought

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[1] 1 Sandf., 672; 8 Johns., 329; 8 How., 288.

[2] 6 Barb., 366; 22 Id., 178; 14 N. Y., 575.

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[4] 4 Johns. Ch. R., 80; see 1 Str., 579; 2 Ld. Raym., 1333; 3 Burr., 1436; 1 Str., 444; 3 P. Wms., 151; Hurd on Hab. Cor., 474.

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before the court, if of proper age, it has been consulted in relation to its wishes.[1]

Statutory provisions in respect thereto.

It is provided by statute that when the husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, the wife, being an inhabitant of this State, may apply to the Supreme Court for a *habeas corpus* to have such minor child brought before such court; and that on the return of such writ, the court, on due consideration, may award the charge and custody of the child to the mother, for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require. Which order may be annulled, varied or modified by the said court at any time thereafter.[2]

The application for the writ, in these cases, is to the Supreme Court,[3] and is addressed to its discretion. It will, therefore, be necessary for the applicant to disclose fully all the facts in the case, that the court may see the propriety of granting the writ. In determining the question of the custody of the infant, the court, as its legal guardian and protector, has reference to its interest and welfare, and

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[1] 8 Johns., 328.

[2] 2 R. S., 148, §§ 1, 2, 3.

[3] 24 Barb., 521.

will make such determination in the premises as its interest and welfare seem to demand.[1] The ability and fitness of the parent to provide for the child will be examined into, in determining such question.[2]

In these cases, the statute authorizes the court to interfere only on the application of the wife. This is upon the hypothesis that the husband and father is entitled to the custody of his children. But the father has not an absolute and unalienable right to such custody. He may be disqualified from exercising it, or he may, by misconduct, &c., forfeit his right. He is subject to control by a Court of Equity, which has a supreme supervision in these matters.[3]

Where the proceeding is a contest between parents in relation to the future charge and custody of their children, and not for the purpose of delivering the infant from any improper restraint, it is not necessary, although it is not improper, for the court to consult the children in relation to their situation and wishes for the future. Nor will the court interfere, as a matter of course, but only upon sufficient grounds.[4]

In deciding upon the question of the infant's

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[1] Hurd on Hab. Cor., 504, citing 5 Binn., 520; 3 Burr., 1436.

[2] 2 How., 61; 18 Wend., 637; 8 Paige, 48.

[3] 25 Wend., 64; 6 Rich., 344; 13 Johns., 418; 1 P. A. Brown, 143.

[4] 18 Wend., 637, per BRONSON, J.

custody, the courts are governed by what appears to be for the *interest of the infant*, and not the superior rights or claims thereto of the respective parents. To ascertain what is for the interest of the infant, the court will look into all the circumstance of the case. And as one of the circumstances, when the infant is of suitable age, the court will consult its wishes, not because the infant has a legal right to determine the question by its will, but because its will is one of the circumstances which it is proper for the court to consider in determining its rightful custody.[1]

The statute also provides for a proceeding by *habeas corpus* by either a husband or wife under the following circumstances: "Whenever application is made to [the chancellor] a justice of the Supreme Court, or any [circuit judge] by any husband or wife, representing that the wife or husband has attached him or herself to the society of shakers, and detains a child of the marriage between them, the officer must inquire into the circumstances; and, if satisfied, by due proof of the facts represented, he must allow a writ of *habeas corpus* to bring such child before him.[2]

It further provides that in case the child is concealed or secreted by or among any society of shakers, the officer may also issue his warrant to the sheriff of the

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[1] Hurd on Hab. Cor., 527.

[2] 2 R. S., 149, § 4; 2 N. Y. S. at L., 155.

proper county, commanding him, in the daytime, to search the dwelling houses and other buildings of the society, or the dwelling houses and buildings of any of the members thereof, or of any other buildings specified therein, for such child, and to bring him before such officer.[1] The child being produced before the officer, its custody may be awarded to that parent which has not joined the shakers, for such time, under such regulations, and with such provisions and directions, as shall be deemed proper.[2]

It would not seem, from the language of the statute, that the officer is bound to deliver the infant in such case to the custody of that parent which had not united with the shakers; but was left to exercise his discretion in view of all the circumstances. Thus, the officer might free the infant from all restraint, and permit it to exercise its own choice as to the parent with whom it would remain.[3]

Proceedings in this class of cases are properly conducted according to the provisions of the forty eighth section of the *habeas corpus* act.[4] The officer before whom the infant is brought will hear all the proofs and allegations of the parties for the purpose of determining the question of the lawfulness of the

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[1] Idem, § 5.

[2] Idem, § 6.

[3] See 1 Sandf., 675.

[4] 2 R. S., 569, § 48; 2 N. Y. S. at L., 590; See 18 Wend., 640; 3 Hill, 647.

detention. The infant being detained by parental authority, and not being entitled to be free therefrom, if it is properly exercised, the court is at liberty to give any latitude to the investigation necessary to determine what the welfare of the infant demands.

When the writ should be certiorari.

The statute provides that whenever an application shall be made for a writ of *habeas corpus*, according to the provisions of that act, to any officer or court, if it appear to such court or officer, upon the facts set forth in the petition, that the cause, matter or offense for which the person is confined or detained is not bailable, according to the provisions of the law, instead of awarding a writ of *habeas corpus*, a writ of *certiorari* may be granted, directed to the officer or person in whose custody or under whose control such prisoner is alleged to be, in like manner as if such writ of *certiorari* had been applied for by the prisoner.[1]

The proceedings upon the return of such writ, are the same as upon the return of writs of *habeas corpus*, and the proofs of the parties in support of, and against the return made, are the same;[2] and it appearing that the person detained is illegally im-imprisoned, confined or restrained of his liberty, a

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[1] 2 R. S., 569, § 50; 1 Barb., 349; Hill, 391.

[2] Idem, § 57.

writ of discharge is granted, commanding those having him in custody to discharge him forthwith; it appearing that he is legally detained, and that he is not entitled to bail, all further proceedings thereon cease.[1]

But if it appear that the person detained is entitled to bail, the court or officer hearing the cause shall, by order, certified by the clerk of the court, or by the officer granting the same, direct the sum in which he shall be admitted to bail, and the court at which he shall be required to appear; and on such order being complied with, by giving the required bail, he shall be discharged.[2]

The statute further provides that upon the production of such order to any judge of the County Courts of any county, he shall be authorized to take the recognizance of the person so detained, and of two sufficient sureties in the sum so directed, with a condition for the appearance of such person at the court designated in such order. But the judge must first be satisfied, by the oath of the persons offering themselves as sureties, that they are householders in the county, and are severally worth double the sum in which they shall be required to be bound, over and above all demands against them.[3]

And the recogniance thus taken must be filed by

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[1] 2 R. S., 569, § 52.

[2] Idem, §§ 54, 70.

[3] Idem, § 55.

the judge with the clerk of the court before which the prisoner is bound to appear; and the judge must also certify, on such order, the compliance therewith; which order, thus certified, being produced, will entitle the prisoner to his discharge.[1] This writ of discharge, or order for the same, may be enforced by the court or officer issuing the writ or making the order, by attachment, in the same manner as is provided for a neglect to make a return to a writ of *habeas corpus*, and with the like effect in all respects; and the person guilty of such disobedience forfeits to the aggrieved party, one thousand two hundred aud fifty dollars, in addition to any special damages such party may have sustained.[2]

The person thus discharged is not liable to be re-arrested, &c., for the same cause;[3] and any person, either solely or as a member of any court, or in the execution of any order, judgment or process, knowingly recommitting such person for the same cause, or aiding in the same, is guilty of a misdemeanor, and forfeits to the party aggrieved, one thousand two hundred and fifty dollars[4]

The statute, however, provides that it shall not be deemed the same cause, when: 1. The party shall have been discharged from a commitment on a criminal

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[1] Idem, § 56.
[2] Idem, § 57.
[3] Idem, § 58.
[4] 2 R. S., 569, § 60.

charge, and afterwards be committed for the same offense, by the legal order or process of the court, wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted of the same offense; or, 2. Where, after a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner is arrested again on sufficient proof, and committed thereon; or, 3. Where, in a *civil suit*, the party has been discharged, from any illegality in the judgment or process hereinbefore specified, and is afterwards imprisoned by legal process for the same cause of action; or, 4. Where, in any *civil suit*, he shall have been discharged from commitment on *mesne* process, and shall afterwards be committed on execution in the same cause, or on *mesne* process in any other cause, after such first suit shall have been discontinued.[1]

Where, from sickness or infirmity of the person detained, he cannot be brought up on a writ of *habeas corpus*, issued for that purpose, without danger, and the party in whose custody such person may be, states such facts in his return, and verifies the same by his oath, the court, being satisfied of the truth of such return, will proceed to hear such cause as upon *certiorari*.[2]

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[1] Idem, § 59, subs. 1, 2, 3, 4. [2] Idem, 569, § 49.

The general provisions of the statute applicable to the writ of *habeas corpus*, are likewise applicable to the writ of *certiorari*. The application for the writs are the same; they must specify which are applied for.[1] They are neither to be disobeyed for a defect in form.[2] Either may be issued without petition in certain cases.[3] Same character of return upon each.[4] Same penalty for disobedience of the command of the writs.[5] Same restriction of inquiry into the legality and justice of the process, judgment, &c.[6] The proceedings before any officer may be removed by *certiorari* into the Supreme Court, to be there examined and corrected. But such writ must be allowed by a justice of the Supreme Court after a final adjudication has been had by such officer, upon the claim of the party to be discharged or bailed.[7] This allowance of *certiorari* may now be made by a judge of the Court of Appeals, or by a county judge, or an officer elected to perform the duties of a county judge.[8] This review is confined to matters of law, and if there has been no error in law, the proceeding cannot be corrected by this method of review.[9]

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[1] Idem, 564, § 25, sub. 6.
[2] Idem, § 29.
[3] Idem, § 31.
[4] Idem, § 32.
[5] Idem, § 34-37.
[6] Idem, § 42.
[7] Idem, 573, § 69; 16 Barb., 862.
[8] L. 1847, 324, § 17; 10 How., 181.
[9] 6 Barb., 369; 24 Id., 521,

The *certiorari* is brought to a hearing by either party upon the usual notice of argument, and has the preference on the morning of any day during the first week of the term.[1]

Appeal to the Court of Appeals. The decision of the Supreme Court in these matters, is now reviewed by appeal to the Court of Appeals.[2] A prisoner whose discharge is refused upon the writ of *habeas corpus*, may prosecute his appeal to the Court of Appeals.[3] This appeal is taken after the Supreme Court has made a final determination upon the writ. Where the commitment is upon some criminal accusation, or the prisoner is detained in a civil suit, in the former case, the attorney-general, in the latter, the party aggrieved may appeal.[3]

The Court of Appeals has power to make all necessary orders, and to issue all such writs as are necessary for the discharge or re-commitment of the prisoner, according to the judgment given by it.[4]

The statute provides, that except where it may be necessary to carry into full effect the provisions of the *habeas corpus* act, the provisions of the common law are abrogated; and that the authority of the courts and

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[1] Supreme Court, Rule 47. 1858.

[2] Code, §§ 8, 11, 323, 333, 457, 471; §§ 190–192, 194, 1293, 1324, 1329; 9 How., 304; 3 Duer, 616.

[3] 2 R. S., 573, § 70.

[4] See 2 R. S., 573, § 71.

officers to award such writ, or to proceed thereon, by the common law, shall be exercised in conformity to the *habeas corpus* act, in all cases therein provided for.[1] And that in all cases the provisions of that act, so far as they may be applicable, and not otherwise provided, shall be applied to every writ of *habeas corpus* authorized to be issued by any statute of the State.[2]

Habeas corpus ad testificandum.

The statute provides that every Court of Record shall have power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of *habeas corpus* for the purpose of bringing before said court any prisoner who may be detained in any jail or prison within this State, for any cause except a sentence for a felony, to be examined as a witness in such suit or proceeding in behalf of the party making such application.[3] The application must be verified by affidavit, and must state: 1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired; and, 2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such cause or proceeding, as he is advised by counsel and verily believes; but if the application

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[1] Idem, § 73.

[2] 2 R. S., 575, § 86.

[3] 2 R. S., 559, § 1.

be made by the attorney-general or district attorney it is not necessary to swear to such advice of counsel.[1]

Such writ is issued by a justice of the Supreme Court, or any officer authorized to perform the duties of such justice, upon the like application of a party to any suit or proceeding pending in a Court of Record, or pending before any officer or body who may be authorized to examine witnesses in any suit or proceeding.[2] The same writ may also be issued by the aforesaid officer, upon the application of a party to a suit before a justice of the peace to bring any prisoner confined in the jail of the same county, or the county next adjoining that where the justice resides, before such justice to be examined as a witness.[3]

Such prisoner being in execution on any civil process, or committed on any criminal charge, must be recommitted after testifying.[4]

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[1] Idem, § 2.
[2] Idem, § 3.
[3] Idem, § 4.
[4] Idem, § 5.

CHAPTER III.

CERTIORARI.

The office of the writ of *certiorari* is to correct errors in a judicial character of inferior courts, and errors in the determination of special tribunals, commissioners, magistrates and officers exercising judicial powers affecting the property or rights of a citizen, and who act in a summary way, or in a new way not known to the common law, and also the proceedings of municipal corporations in certain cases.

The Supreme Court has jurisdiction to award a *certiorari*, even where the law has provided some other tribunal to hear and determine the questions, if the jurisdiction is not taken away by express words.

The acts of officers of municipal corporations, if plainly judicial in their character, may be reviewed on *certiorari*.[1] So, the determination of an appeal from the commissioners of highways.[2] So, the decision of an officer to whom an application for a *habeas corpus* is made, that he has no jurisdiction to grant it.[3] So, where an officer discharged a complaint under the act

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[1] 2 Hill, 11.

[2] 2 Cai., 179; 15 Johns., 137.

[3] *People* v. *Mayer*, 16 Barb., 362.

to abolish imprisonment for debt, on the ground of want of proof.[1] So, in proceedings in insolvency[2] and court martial.[3] So, as to the determination of canal appraisers, where it is alleged they acted without notice.[4] So, as to a municipal assessment for a local improvement where there has been an essential departure from the statute in the principal of assessment.[5] Decisions made under the absconding debtor act may also be examined by the Supreme Court upon *certiorari*,[6] likewise any adjudication in summary proceedings to recover the possession of land.[7]

The order of a board of health, adjudging a certain business a nuisance, is a legislative act, and cannot be reviewed by *certiorari*.[8] A void order of commissioners of highways may be treated as voidable, and the party may bring a *certiorari* to quash it.[9] In order to warrant interference with a municipal corporation by *certiorari*, the act must be plainly judicial. A *certiorari* does not lie to review a corporate resolution appropriating land

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[1] *Learned* v. *Duval*, 3 Johns. Cas., 141.

[2] *Anon.*, 1 Wend., 90.

[3] *Rathbun* v. *Sawyer*, 15 Wend., 451.

[4] *Fonda* v. *Canal Appraisers*, 1 Wend., 288.

[5] *People* v. *City of Rochester*, 21 Barb., 656; *Betts* v. *City of Williamsburgh*, 15 Wend., 255.

[6] 3 R. S., 5th ed., 902 (602).

[7] Idem, 839 (516).

[8] *People* v. *Board of Health*, 20 How. Pr., 458.

[9] *Fitch* v. *Commissioners of Kirkland*, 22 Wend., 132.

for a public square.[1] In general the court will not allow this writ where taxes or award of damages are in question, which affect a considerable number of persons.[2]

The granting of a *certiorari* is in the discretion of the court, and it is often denied where the power to issue it is unquestionable, and where there is apparent error in the proceedings below.[3] Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the mere object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice.[4] A *certiorari* should not issue where the party has another adequate remedy,[5] nor until the case is finally adjudicated below.[6] It seems that the writ will not be granted after two years,[7] and in some cases the lapse of a shorter time may be ground for refusing the allowance.[8]

Whenever the right to review by *certiorari* is given

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[1] *Matter of Mount Morris Square*, 2 Hill, 14.

[2] *Case of Fifty-first Street*, 3 Abb. Pr., 232.

[3] *People* v. *Stillwell*, 19 N. Y., 531.

[4] *People* v. *Mayor, &c., of New York*, 5 Barb., 43.

[5] *People ex rel. Onderdonk* v. *Supervisors of Queens*, 1 Hill, 195.

[6] *Lynde* v. *Noble*, 20 Johns., 80.

[7] 25 Wend., 693; 2 Hill, 9.

[8] 7 How. Pr., 166.

by statute, the writ issues as a matter of course, as where it is to review a report of commissioners in a New York street case,[1] or to review an indictment for forcible entry and detainer.[2] In other cases it can only issue by order of the court.

Applying for the writ. An affidavit should be prepared showing the facts which the party supposes entitles him to the writ of *certiorari*, and upon this a motion must be made for the allowance of the writ, in all cases where the writ does not, by statute, issue of course, or is issued on behalf of the people.[3] The motion should be made at special term (it cannot be allowed by a judge or other officer at chambers),[4] and it may be *ex parte;* but the court may, if it is in doubt, instead of allowing the writ on *ex parte* motion, grant an order to show cause, and hear the other side before determining the question. If the writ is granted, an order to that effect should be entered.

The writ. A *certiorari* is a judicial writ; it issues out of the Supreme Court; it must be sealed, and should be directed to the judge or officer, or other

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[1] *Matter of Mount Morris Square*, 2 Hill, 14.

[2] *People* v. *Runkle*, 6 Johns., 334.

[3] *Munroe* v. *Baker*, 6 Cow., 396; 13 Wend., 664; 20 Id., 655; 2 Hill, 14; 6 Johns., 334.

[4] *Gardner* v. *Commissioners of Warren*, 10 How. Pr., 181.

party complained of, reciting the proceedings, and commanding the judge or officer to certify and return the record or proceedings to the Supreme Court on a specified day. It is tested and signed like an ordinary writ; but it should be indorsed with a copy of the order allowing the writ, or a certificate that the same has been duly allowed.[1] It is sufficient if a copy of the order allowing the writ is served with it. A party who has no interest cannot prosecute the writ of *certiorari*,[2] and the writ must show that some person is aggreived, and recite his complaint.[3] It cannot be prosecuted at the suit of an individual, but must be at the suit of the people upon the relation of an individual.[4] If the writ is issued upon the relation of public officers, the names of the officers, with the title of the office, should be given, as in the case of the overseers of the poor, the individual names of the overseers, in addition to the name of the office, should be given.[5] If the writ is to review the proceedings of a municipal corporation, it should be directed to the corporation by its corporate name.[6] So, if it is intended

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[1] *Mott* v. *Commissioners of Rush*, 19 Wend., 640.

[2] *Colden* v. *Botts*, 12 Wend., 234.

[3] *Exp. Mayor of Albany*, 23 Wend., 277.

[4] *Wildy* v. *Washburn*, 16 Johns., 49.

[5] *Overseers of Greenville* v. *Bishop*, 2 How. Pr., 187.

[6] *Starr* v. *Trust of Rochester*, 6 Wend., 564; *Exp. Mayor of Albany*, 23 Wend., 277.

to bring up the proceedings of the New York police board for review, the writ should be addressed to the police board, without naming the commissioners.[1] If it is intended to review the proceedings of officers, the individuals should be named, with the style of their office. The writ should be made returnable at a general term, in the district where the case arose.[2]

Motion to quash or supersede the writ. If the writ has been irregularly or prematurely allowed, the court will, on motion, direct a supersedeas of the writ to be entered, as where it was made to appear that the writ was allowed before the proceedings removed by it were completely terminated.[3] This motion should be made before the return. If the writ was granted in an improper case, the defendant may move to quash it, and the court will quash it even after a return and hearing on the merits.[4] It has been said that a motion to quash the writ cannot be sustained till after the return has been made,[5] but no good reason is apparent why it may not be made at any time.[6] The motion papers should be entitled with the name of the de-

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[1] *People* v. *Cholwell*, 6 Abb. Pr., 151.

[2] *The People* v. *Kelley*, 35 Barb., 448.

[3] *People* v. *Peabody*, 5 Abb. Pr., 194.

[4] 2 Hill, 9; 1 How. Pr., 141.

[5] *Clark* v. *Lawrence*, 1 Cow., 48.

[6] *S. & W. R. R. Co.* v. *McCoy*, 5 How. Pr., 378.

fendant in error, *Ads. The People ex rel., &c.*, the plaintiff in error.[1]

Effect of writ as to stay. The service of a *certiorari*, unaccompanied by any qualification, suspends the powers of those to whom it is directed, unless the order or judgment has begun to be executed.[2]

The return. The writ is obeyed by returning and certifying the record of the proceedings of the inferior tribunal, and where there is technically no record, the written proceedings and orders, or a history of the proceedings, and the written orders which are in the nature of records, are to be certified, and filed in the clerk's office of the county where the order allowing the writ is entered.[3] Nothing but the record or history of the proceeding need be returned;[4] but it should be shown that the tribunal had jurisdiction, and enough of the facts or evidence before the inferior court should be returned to enable the court to determine upon a point of jurisdiction or other question of law arising in the course of the proceeding.[5] On a *certiorari* to remove proceedings by a landlord to recover possession

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[1] *Peck* v. *Witbeck*, 2 How. Pr., 70.

[2] *Patchin* v. *Mayor, &c., of Brooklyn*, 13 Wend., 664; *Conover Case*, 5 Abb. Pr., 182.

[3] 25 Wend., 168.

[4] *Starr* v. *Trustees of Rochester*, 6 Wend., 564.

[5] *Mullins* v. *The People*, 24 N. Y., 403; *Rathbun* v. *Sawyer*, 15 Wend., 452.

of land, the court will require the return of so much of the evidence as is necessary to show that the relation of landlord and tenant existed between the parties.[1] So, on *certiorari* to the sessions, in a bastardy case, the court may order the sessions to return such facts as are necessary to review the law of the case.[2] So, on a *certiorari* to the general sessions to remove their proceedings, on an order of settlement, the sessions will be compelled to return the evidence and points of law.[3] In the return of a regimental court-martial to a *certiorari* to review their proceedings, in imposing a fine, the facts or evidence are not to be returned any further than is necessary to enable the court to determine upon a point of jurisdiction or other question of law arising in the course of the proceeding.[4]

Upon a common law *certiorari* to the referees in highway cases, to review their proceedings on an appeal from the highway commissioners, all facts and evidence bearing on the question of jurisdiction must be returned, including that in relation to the character and termini of the proposed road, and that which relates to the validity of the application to the com-

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[1] *Benjamin* v. *Benjamin*, 1 Seld., 383.

[2] *Sweet* v. *Overseers of Clinton*, 3 Johns., 23.

[3] *Overseers of Brookhaven* v. *Overseers of Southold*, 2 Cow., 575.

[4] *Rathbun* v. *Sawyer*, 15 Wend., 451.

missioners; but that which tends simply to show the public utility of the proposed road, need not be stated.[1]

Inferior magistrates, when required by a common law writ of *certiorari*, to return their proceedings, must show, affirmatively, that they had authority to act; and where their authority and jurisdiction depends upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact is established.[2] It is the duty of the court below to return enough of the proceedings to show, not only that they had jurisdiction of the subject matter of the inquiry and of the person, but also that some proof was made which had at least a tendency to establish the material allegations in issue.[3] The return cannot be contradicted by an assignment of errors; it must be taken as conclusive, and acted upon as true. If false, the remedy is by action.[4]

If the writ require unnecessary evidence to be returned, such requisition may be disregarded.[5] If the

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[1] *People ex rel. Van Rensselaer* v. *Van Alstyne*, 32 Barb., 131.

[2] *People ex rel. Bodine* v. *Goodwin*, 5 N. Y., 568; *Millins* v. *The People*, 24 N. Y., 397.

[3] *People* v. *Overseers of Ontario*, 15 Barb., 286.

[4] *Haines* v. *Judges of Westchester*, 20 Wend., 625.

[5] *Ex parte Mayor, &c., of Albany*, 23 Wend., 277.

return contains any thing not proper, it will be disregarded *pro tanto.*[1] The court will disregard matter in the return not called for by the writ, and will not intend that proceedings not returned were irregular.[2] But the necessary evidence to make out a fact essential to the jurisdiction of the officer will not be assumed.[3] If the writ is directed to an officer, and he goes out of office before making his return, he may, notwithstanding, make a valid return of what was done by him while in office.[4] If the person or officer to whom the writ is directed, dies before any return is made, the court will hear and decide the case, on motion and affidavit.[5]

Hearing. The case may be brought to hearing at general term, by either party, upon the usual notice of argument; and is entitled to a preference on the morning of any day during the first week of the term.[6]

How determined. If, on examination, it appears that the court below had no jurisdiction of the subject matter, or that there was no evidence legally tending to establish the main facts which could authorize the

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[1] *The People* v. *Mayor, &c., of N. Y.*, 2 Hill 9.

[2] *Lawton* v. *Comm'rs of Cambridge*, 2 Cai., 179.

[3] *People* v. *Soper*, 7 *N.* Y., 128.

[4] *Harris* v. *Whitney*, 6 How. Pr. 175.

[5] *Matter of Shotwell*, 10 Johns., 304; *Seymour* v. *Webster*, 1 Cow., 168.

[6] Supreme Court, Rule 47.

judgment — in either case, the court will set the judgment aside. In such cases, the court does not deliberate upon the weight and just force of evidence, but determines merely whether there is any evidence whatever;[1] and where the *certiorari* is authorized by statute, the court may also examine and correct any erroneous decisions of the officer upon questions of law.[2] On a *certiorari* to review an assessment made by judges, under an act authorizing the construction of a dam, and providing that the damages of lands taken might be assessed by judges of the common pleas, it is the duty of the court to inquire into the principles upon which the judges assessed the damages, and if they were erroneous, the whole assessment should be set aside.[3] So where the common pleas assessed damages to persons *not* owners, their determination may be reviewed upon the evidence in the return.[4] In reviewing assessments for local improvements, the court will only look at the principle of apportionments and not to the amount charged to any individual.[5] The court

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[1] *People* v. *Overseers of Ontario*, 15 Barb., 286; *Millins* v. *The People*, 24 N. Y., 399.

[2] *Morewood* v. *Hollister*, 6 N. Y., 309.

[3] *Baldwin* v. *Calkins*, 10 Wend., 166.

[4] *Stone* v. *Mayor of N. Y.*, 25 Wend., 157.

[5] 2 Wend., 395; 15 Id., 374; 23 Id., 277.

will not review the acts of boards of supervisors in levying the general town and county taxes, when no complaint is made as to the principle on which the tax was apportioned, but only that the supervisors erred in auditing some of the county charges.[1] An objection that one of the judges had previously passed upon the same question, cannot be taken for the first time on *certiorari;*[2] but where more jurors were summoned in a summary proceeding, than the statute prescribes, the proceeding will be reversed on *certiorari.*[3]

Judgment. Judgment is entered according to the decision of the court, and perfected as in ordinary actions.

At common law, the office of the writ is to review erroneous decisions of inferior tribunals, in cases when there is no other available remedy; and where otherwise injustice might be done. In all other cases it is confined to bringing up the records to enable the court to determine whether it has acted within or in excess of its jurisdiction.[4] Unless the statute in express terms makes the determination of the inferior tribunal *final and conclusive,* the court may, in cases where there is no other available remedy, to prevent injustice,

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[1] *People* v. *Supervisors of Allegany,* 15 Wend., 198.

[2] *Commissioners of Carmel* v. *Judges of Putnam,* 7 Wend., 264.

[3] *Farrington* v. *Morgan,* 20 Wend., 207.

[4] 30 N. Y., 72; 55 id., 600.

review all questions of *jurisdiction, power and authority* on the part of the inferior tribunal to do the acts complained of, as well as the regularity of their proceedings.[1] In *People* v. *Supervisors*,[2] the court held that it was the office of a certiorari to review the determination of inferior boards where a claim was rejected as unjust or illegal.[3] But apparently *contra*, see *People* v. *Delaney*.[4] But an examination of that case will show that it does not really conflict with the doctrine of the other cases. Where the statute makes the action of the inferior tribunal *final and conclusive*, their proceedings cannot be revised or reviewed upon certiorari.[5] The granting of the writ rests largely in the discretion of the court, and is not a matter of strict right. It is to be allowed or denied according to the justice and equity of the case;[6] and will be quashed at any stage of the proceedings when it appears to have been improvidently granted.[7] It is addressed to all the persons whose return is necessary to enable the court to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed, and the fact that the person is

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[1] 40 N. Y., 154; 48 id., 513; 39 id., 506; 40 id., 105.
[2] 51 N. Y., 442.
[3] 52 N. Y., 338.
[4] 49 id., 665.
[5] 55 N. Y., 600.
[6] 65 Barb., 435; id., 1; 52 N. Y., 445; 42 Cal., 252.
[7] 34 N. J. L., 261.

out of office is no objection, if he has the custody of the record; the writ lies against his executors or administrators even after his death, when the record is in their custody.[1]

At common law a writ of certiorari is the proper remedy upon which to correct the errors of all inferior tribunals, where they have exceeded their jurisdiction or proceeded illegally, and there was no appeal or other mode of reviewing or correcting their proceedings;[2] and it may issue in any stage of the proceedings, when the action of the court or the boards whose proceedings are complained of is contrary to law;[3] or is palpably unjust or oppressive, even though the result ensues from the exercise of its discretion, as where an adjournment is refused, and a decision made without giving a party a fair hearing;[4] but if there is a full and adequate remedy by appeal, certiorari does not lie;[5] or if there is an ample remedy by writ of error;[6]

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[1] 65 Barb., 171; 24 Mich., 182.

[2] 22 Ill., 105; 8 Gill (Md.), 150; 8 N. J., 123; 11 Mass., 466; 4 Ired. (N. C.), 155; 5 Binn. (Penn.), 27; 8 Wend. (N. Y.), 47; 5 Strobh. (S. C.), 29; 1 Cal., 152.

[3] 8 Ohio, 142; 4 Hayw. (Tenn.), 100; 2 Yerg. (Tenn.), 173; 13 Pick. (Mass.), 195.

[4] 1 Wend. (N. Y.), 288; 1 Miss., 112.

[5] 46 Ga., 41; 8 Nev., 84.

[6] 1 Ired. (N. C.), 408.

but the mere fact that an appeal lies does not necessarily deprive a party of the remedy. If an appeal has been unlawfully denied, or if the party by fraud, accident, or mistake has been deprived of his appeal, certiorari is the proper remedy.[1] The granting of the writ is not a matter of right, but rests in the sound discretion of the court;[2] and if the party by any laches on his part, or on the part of his attorney, has neglected to avail himself of an appeal or other adequate remedy, the writ will be denied;[3] or if substantial justice has been done, or if ruinous consequences would ensue, and the parties cannot be placed in *statu quo*, the writ will not be granted for mere informalities in the proceedings; but, if the record shows want of jurisdiction, or a serious error of law, the rule is otherwise.[4] The court is bound to act upon strict legal principles, and if any error, however unimportant or foreign to the merits of the case, appears, it is bound to quash the proceedings. But in the exercise of its *discretion* it will examine all the circumstances, and if it finds that substantial justice

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[1] 2 Murph. (N. C.), 100; 3 Jones (N. C.), 195; T. U. P. Charlt. (Ga.), 38; 1 Taylor (N. C.), 15; 4 Greene (Iowa), 94.

[2] 2 Hill (N. Y.), 9; 24 Vt., 288.

[3] 1 Overton (Tenn.), 59; 3 Dev. (N. C.), 528; 1 Blackf. (Ind.), 414.

[4] 20 Pick. (Mass.), 71.

has been done without violating any *important* rules of proceeding, the writ will not be granted, although some formal or technical errors may appear, and extrinsic evidence is receivable upon this inquiry, not to *contradict* the records, but to show that there was a more perfect compliance with the rules of law than the record shows. But if the record itself shows *affirmative defects,* they are incurable, and the proceedings will be set aside, but, where there are no affirmative defects, extrinsic evidence is admissible to show that substantial justice has been done.[1]

The office of the writ at common law is confined to the correction of the errors of inferior tribunals of every description, whether courts or public boards, where their action directly affects the rights of others, in cases where they exceed their jurisdiction, or act illegally in respect to a substantive matter. But where the error is as to the *facts* the writ does not lie. The record must show illegality;[2] but where the *discretion* of a court or board has been unjustly exercised, and the injustice is palpable and contrary to the settled principles of law;[3] or when an adjournment is unjustly denied, so that a party is deprived of a fair

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[1] 24 Pick. (Mass.), 184; 4 id., 32; 15 id., 3; 9 id., 50; 8 Me., 137; 22 N. J., 1026.

[2] 8 Ohio, 142.

[3] 1 Miss., 112.

hearing, certiorari is the proper remedy;[1] or if he has been unjustly deprived of an appeal;[2] or if his appeal has been dismissed improperly.[3] It lies to correct proceedings in cases of foreign attachment;[4] or to take up the proceedings of an inferior tribunal when an appeal does not lie;[5] or where there is irregularity in proceedings for forcible entry and detainer;[6] or where the action of an inferior tribunal is contrary to law as relates to its method of procedure;[7] or where proceedings are taken against a party without notice;[8] to review the proceedings of surrogates, judges of probate, or of Orphans' Courts;[9] of Justices' Courts;[10] of commissioners of highways;[11] of municipal boards;[12] of county commissioners;[13] or

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[1] 8 Wend. (N. Y.), 47.

[2] 2 Hawks (N. C.), 41; 4 Hayw. (Tenn.), 143; 1 Bush. (N. C.), 41.

[3] 2 Overton (Tenn.), 108.

[4] 2 Ohio, 27; 3 Johns. (N. Y.), 141; 13 N. J., 250; 17 id., 104.

[5] 5 Humph. (Tenn.), 425; 4 Dev. (N. C.), 99; 6 S. & R. (Penn.), 524.

[6] 1 Ark., 480; 1 Hempst. (Tenn.), 3.

[7] R. M. Charlt. (Ga.), 208; 2 Ala., 35; 27 Tex., 78.

[8] 3 Mass., 229; 15 Johns. (N. Y.), 557; 8 Me., 135.

[9] 1 Nev., 82; 10 Ala., 622; 14 N. J., 207; 3 H. & M. (Md.), 348.

[10] 1 Swan. (Tenn.), 277; 19 Penn. St., 495; 1 Cow. (N. Y.), 437.

[11] 8 Vt., 271; 8 Pick. (Mass.), 440; id., 218

[12] 16 Ga., 172.

[13] 19 Pick. (Mass.), 298.

any body that acts in a judicial capacity, to correct *judicial* acts, but not where the matters complained of are purely ministerial.[1] Generally, the court will not look beyond the records, except to ascertain whether substantial justice has been done, when the only matter complained of is informality in proceedings;[2] nor will it examine into the *merits* of the case;[3] nor inquire as to conclusions of fact;[4] or the decision of the court thereon;[5] but is confined exclusively to such irregularities and errors as appear upon the face of the record, and if none appear, the writ will be denied;[6] and the court may award the writ in the first instance or issue an order to show cause. In addition to the common law remedy by certiorari, provision is made by statute in most of the States, for remedies thereby in addition to the common law causes for which it will issue, but for such instances, reference must be had to the several statutes, as it would be impractical to enumerate or review them here.

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[1] 5 Barb. (N. Y.), 43; 4 Cow. (N. Y.), 297; 8 Cush. (Mass.), 292; 16 Abb. Pr. (N. Y.), 169.

[2] 21 N. Y., 82; 1 Minn., 45; 30 N. J., 331; 14 Cal., 479.

[3] 15 Abb. Pr. (N. Y.), 167; 18 N. J., 179.

[4] 24 N. J., 37; 3 Wend. (N. Y.), 342.

[5] 24 N. J., 838; 25 id., 173; 34 Penn. St., 184; 7 Mich., 472.

[6] Barb. (N. Y.), 122; 21 Wend. (N. Y.), 651; 6 Cow. (N. Y.), 555.

A sentence in excess of the term fixed by law will be reversed upon certiorari.[1] The action of canal appraisers, so far as legal questions are raised by the proceedings before them, may be reviewed by certiorari.[2] The action of a board of election canvassers may be reviewed by certiorari to the extent of determining whether their action was legal.[3] When no provision is made for an appeal from a surrogate the proceedings may be brought up by certiorari.[4] So, to review the action of a justice of the peace in a matter over which he had no jurisdiction.[5] Proceedings for the assessment and collection of taxes may be brought up and reviewed by certiorari;[6] and should be brought in the name of the people on the relation of any tax payer aggreived thereby.[7] Certiorari lies to review tax assesments;[8] but it will not be granted until the assessment is complete;[9] nor will a certiorari be allowed while an appeal is pending;[10] but the pendency of proceedings in equity is no reason for refusing the

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[1] 3 Brewst. (Penn.), 30.
[2] 2 Lans., 368.
[3] 65 Penn. St., 26.
[4] 44 Ala., 333.
[5] 41 Ga., 624.
[6] 57 Barb., 577.
[7] Id.; 25 Wis., 594; 34 N. J. L., 438; 16 Gray (Mass.), 38; 47 Mo., 594.
[8] 1 T. & C., 101; 2 Hun., 582; 49 N. Y., 655; 53 id., 49; 4 Hun, 187; 4 T. & C., 289.
[9] 5 T. & C., 609.
[10] 4 T. & C., 438.

writ. When commissioners of assessment arbitrarily assume that all lands are to be equally benefited by a public work, without considering the relative difference of situation, it is erroneous, and such an error as is ground for reversal on certiorari.[1] Certiorari has been held a proper remedy to review proceedings to drain lands;[2] or indeed the *judicial* acts of any public body.[3] It lies as a matter of right to review an insolvent discharge.[4] A person who was not a party to the proceedings below may sue out certiorari if he is a party in interest;[5] as on the application of the president of a corporation when the corporation is interested.[6] After appearance and full return objection cannot be made that the writ is improperly addressed.[7] The return to a common law writ of certiorari is conclusive.[8] Certiorari will not lie to remove a record that is lost from the files; the loss must first be supplied in the inferior court, as a court cannot be compelled to certify to that which it has no means of verifying.[9] Nor will it lie when there is an adequate remedy by appeal;[10] nor to review the proceedings

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[1] 55 N. Y., 604.
[2] 3 T. & C., 224.
[3] 7 Lans., 220; 55 N. Y., 604; 51 id., 442.
[4] 4 Hun, 641.
[5] 52 N. Y., 45.
[6] 51 N. Y., 443.
[7] 50 N. Y., 525.
[8] 6 Hun, 625.
[9] 1 Cal., 490.
[10] 8 Nev., 84; 46 Ga.. 41.

of a court in refusing to grant a new trial;[1] nor to a court of concurrent jurisdiction;[2] the rule being that a writ of certiorari may issue "if the record pleaded is in a more base court than that in which it is."[3] Proceedings under bonding acts may be reviewed by certiorari, under the act of 1871;[4] and there would seem to be no question that the right existed at common law.[5] A court of general jurisdiction has, at common law, power to review on certiorari the final adjudications of special statutory tribunals that act in a summary way different from the course of the common law;[6] as to a board of equalization to equalize taxes;[7] the proceedings of highway officers in opening or closing highways;[8] of commissioners to locate a highway;[9] of supervisors on a claim, and the court, while it cannot compel the board to act, can correct any error in their proceedings, and if the board should then refuse to act, the court can give the relief to which the party is entitled.[10] The effect of a certiorari is to present to the court the grounds upon which a judicial body proceeded, and the court is to say

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[1] 43 Cal., 312.
[2] 1 Cal., 194.
[3] 4 Viner's Abr., 329.
[4] 63 Barb., 454.
[5] 7 Lans., 467; Fitzherbert's N. B., 245.
[6] 50 Mo., 134; 35 N. J. L., 200; 60 Me., 266.
[7] 32 Cal., 582.
[8] 2 Oregon, 34.
[9] 97 Mass., 193.
[10] 51 N. Y., 442.

whether, upon the facts embraced in the record, it acted rightly, and if not, to correct the error.[1]

The only effect of the writ is to bring up the record of proceedings, and the case must be decided upon the record alone, and if there is no error in that, the judgment or action of the inferior tribunal will be affirmed, otherwise the proceedings of the lower tribunal should be quashed.[2] The court can only deal with questions of law, and cannot say what the court should have done if the facts had been different.[3] When proceedings are brought up from an inferior court on a writ of *certiorari*, whatever the evidence in the inferior tribunal *tended* to show, *is treated as proved* in support of the judgment; as, where, in an action for money had and received upon a draft, evidence that the defendant was present when another transferred the draft and received the money, was held sufficient to authorize the presumption that the money was paid to the defendant by such other person.[4] The court will not go beyond the record. Thus, where an affidavit complains of rulings of the court, but no return is made except of the record, and the plaintiff went to trial on the return, it was held

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[1] 35 N. J. L., 558; 28 Wis., 270.

[2] 41 Ala., 478; 35 N. J. L., 558; 28 Wis., 270.

[3] 34 N. J. L., 343; 16 Gray (Mass.), 341.

[4] 25 Mich., 132.

that the court could not go beyond the record before it. In such a case the evidence forms no part of the record, and in the absence of any thing in the record to establish the contrary, it will be presumed that the evidence was sufficient both in form and substance to warrant all the findings.[1] The fact that all the allegations of error are not sustained, or that improper parties are made defendants, is not necessarily fatal to the proceedings. In such cases the court may quash the writ, or proceed to correct such proceedings as are sought to be reviewed as are illegal, and to affirm such as are legal if they are independent of each other, and may consider the case upon its merits, if the public interests require it.[2] Costs upon a *certiorari* may be allowed or not, in the discretion of the court.[3] The Supreme Court may, in its discretion, grant or refuse a common law writ of *certiorari*, and its decision is not reviewable upon appeal. The fact that the relator has no other remedy does not affect the discretionary power of the court. Unreasonable delay in applying for, may be a good ground for denying the writ, or for quashing it even after allowed, and even after hearing and return. Thus, in *People* v. *Hall et al.*,[4] the writ was issued September 2, 1872, against

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[1] 25 Mich., 251; 12 Minn., 78.

[2] 57 Barb., 593.

[3] 40 How. Pr., 35.

[4] 53 N. Y., 547.

the defendants, as commissioners of the town of Ontario, under an act authorizing towns to bond themselves in aid of the Lake Shore Railroad. The return of the commissioners show that the assessors made their return August 30, 1870. The papers were filed December 23, 1870. The commissioners were appointed December 24, 1870, and subscribed for stock which was fixed at $85,000, and on September 23, 1871, they issued $34,000 of bonds to the railroad company, and on November 13, 1871, $17,000 more. The General Term, upon the hearing on the return, quashed the writ upon the ground of unreasonable delay in bringing the writ. The Court of Appeals held that the action of the General Term was final; that the court below exercised its discretion, which is not reviewable, and that in this class of cases appeals lie only when the court has passed upon the merits, and questions of law are presented.[1] As to effect of delay in bringing writ, see *People* v. *Supervisors*,[3] and *People* v. *The Mayor*,[2] in which it was held a case could rarely happen in which it would be proper to allow the writ after the lapse of two years. But RAPALLO, J., very justly says that "there is no fixed limit as to time, and that circumstances might arise in

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[1] 19 N. Y., 531; 47 id., 420. [3] 2 Hill, 12.
[2] 15 Wend., 198.

which even a *shorter* delay would be unreasonable." Thus it will be seen that in all cases where *laches* in bringing the writ are alleged, the reasonableness or unreasonableness of the delay must be determined by the circumstances of each case.[7]

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[7] 65 Barb., 9; 2 Hun, 385; 1 id., 544.

CHAPTER IV

THE ACTION OF QUO WARRANTO.

The former proceeding by information in the nature of *quo warranto*, and the writ of *quo warranto*, are abolished by the Code, and the remedies formerly attainable by such forms and proceedings, are obtained by civil actions.[1] An examination of the provisions of the statute under which the former proceedings were had, by information in the nature of a *quo warranto*, and the provisions of the Code by which a civil action is substituted as a means of attaining the same remedies, will show that the former proceeding by information, and the latter by action, are substantially the same; almost every provision of the Code is a re-enactment of the same or similar provisions of the statute; consequently, the practice under the Code will differ from that under the statute only as the practice in civil actions may differ from that in special proceedings. The differences between the two modes of proceeding will be pointed out during the progress of this chapter.

Against corporations. According to the provisions of the Code, the attorney-general, whenever directed by

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[1] Code, § 428.

the legislature, may bring this action in the name of the people of this State against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion, or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.[1] Or the attorney-general may bring the like action on leave granted for that purpose by the Supreme Court, or a judge thereof,[2] for the purpose of vacating the charter, or annulling the existence of a corporation — other than municipal — whenever such corporation shall, either: 1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or, 2. When it shall have violated the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or, 3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or 4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or, 5. Whenever it shall exercise a franchise or privilege not conferred upon it by law; and it is made the duty of the attorney-general, whenever he has

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[1] Code, § 429.

[2] See 2 R. S., 583, § 41.

reason to believe that any of these acts and omissions can be established by proof, to apply for such leave; and upon leave being granted, to bring such action, in every case of public interest, and also in every other case where satisfactory security for costs and expenses shall be given.[1] Actions of this character must be brought by the attorney-general, in the name of the people of the State.[2]

Leave, how obtained. Leave to bring the action is granted upon the application of the attorney-general; and the court, in its discretion, directs notice of such application to be given to the corporation or to its officers, previous to granting such leave; and it may hear the corporation in opposition thereto.[3] These provisions of the Code for proceedings against corporations are the same as they were by statute.[4] The statute provided that leave to file the information might be granted by the Supreme Court, in term time; or by any justice thereof, but by no other officer, upon the application of the attorney-general, in vacation.[5] The same is probably applicable under the Code, although it does not specify that the application shall be to the Supreme Court, in term time, and to a judge thereof in vacation.

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[1] Code, § 430; see 2 R. S., 583, § 39.

[2] 12 How., 187.

[3] Code, § 431.

[4] 2 R. S., 583, § 39.

[5] 2 R. S., 583, § 40.

The Code has not specified any particular practice in the action of *quo warranto;* probably the practice under the statute, so far as the same may be applicable, would be followed in aid of the civil practice. Under the statute, the attorney-general, obtaining leave to file his information, caused the same to be indorsed thereon, under the hand of the clerk of the court, or by the justice granting the same, and forthwith filed the same;[1] and thereupon a writ of summons was issued against the corporation, directed to the sheriff of the county where the principal office of the corporation or place of business are situated, commanding him to summon the coporation to appear in the Supreme Court and answer the information filed.[2]

The summons thus issued was served, in proper time, on the presiding officer, the cashier, the secretary or the treasurer of the corporation; and when there was no such officer in the corporation, then the court directed on what officer or other member of the corporation the service should be made, or in what manner it should be done.[3]

Under the former practice, the information filed by the attorney-general performed the office of the complaint, to be filed on leave in the civil action under

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[1] 2 R. S., 584, § 41.
[2] 2 R. S., 584, § 41.
[3] 2 R. S., 458, § 5.

the Code; and the substance and form of the complaint to be filed must necessarily be like that of the information under the former practice. Every averment essential to a valid information must be contained in the complaint; and the summons issued against the corporation, under the present practice, can differ in nothing material from the summons issued upon the former information filed.

Under the former practice, where the corporation appeared by counsel on the application for leave to file an information, and was heard in opposition to granting such leave, the issuing of process might be dispensed with on filing such information; for the corporation was already sufficiently informed of the pendency of such proceedings against it.[1] In the absence of any provision changing the practice, in this respect, it is presumed the old practice would be followed.

In an action against such corporation, if it shall be adjudged that, by neglect, abuse or surrender, it has forfeited its corporate rights, privileges and franchises, judgment must be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.[2] And in such case, or in case the judgment be against

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[1] 2 R. S., 584, § 41.

[2] Code, § 442.

persons claiming to be a corporation, the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation; or, by attachment or process against the directors or other officers of such corporation.[1] And when judgment is thus rendered against a corporation, the court has power to restrain the corporation, or to appoint a receiver of its property, and to take an account and make a distribution thereof among its creditors, according to the provisions of the statute made in case of voluntary dissolution.[2] And it is made the duty of the attorney-general to institute proceedings for such purpose, immediately after the rendition of such judgment.[3]

Action upon information or complaint of course against individuals.

The Code further provides that an action may be brought by the attorney-general in the name of the people of the State, upon his own information, or upon the complaint of any private party, against parties offending in the following cases. 1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or, 2.

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[1] Code, § 443.

[2] 2 R. S., 467; 2 N. Y. S. at L., 488.

[3] Code, § 444.

When any public officer, civil or military, shall have done or suffered an act which, by the provisions of the law, shall make a forfeiture of his office; or, 3. When any association or number of persons shall act within this State as a corporation, without being duly incorporated.[1] Under the old practice, information in the like cases might be filed by the attorney-general, either upon his own relation or upon that of any private party; to be filed in the Supreme Court, either in term time or in vacation; and no application to the court for leave to file the same was necessary.[2] And where several persons claimed to be entitled to the same office, or franchise, one information against them all was sufficient,[3] as is now one suit in the like case.[4]

In an action under the Code, brought by the attoney-general on the relation or information of a person having an interest in the question, the name of such person must be joined with the people as plaintiffs.[5]

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[1] Code, 432.

[2] 2 R. S., 581, § 28.

[3] 2 R. S., 584, § 45.

[4] Code, § 440.

[5] Code § 434. The People on the relation of A. B. against C. D. is the form used. In this action, brought on the relation of the person claiming the office against the party usurping it, the one claiming the office should be joined; and the complaint must state facts showing that he is entitled to the office. *People* v. *Ryder*, 12 N. Y., 433; 12 Barb., 304.

The Code also provides, that whenever such an action shall be brought against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his rights thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the Supreme Court for the arrest of such defendant, and holding him to bail; and under such order he may be arrested and held to bail, in the manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.[1] The rules of pleading to, or answering the allegations of, the complaint, are the same as in other civil actions.

Judgment in such actions.

In such cases the judgment may be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled; or, it may be upon the right of the defendant only, as justice may require.[2] In such action against an intruder into a public office,

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[1] Code, § 435; see the same provision in the statutes; 2 R. S., 582, § 30.

[2] Code, § 436, same provision; 2 R. S., 582, § 31; 2 N. Y. S. at L., 603.

if the judgment of the court is for the plaintiff, it has been held that it can only be a judgment of ouster, and for costs; that the plaintiff's claim for damages against the defendant to recover for fees collected, &c., must be asserted in a separate action.[1] This was different under the Revised Statutes. If fees had been received by the defendant, the plaintiff alleged it by suggestion after judgment, in the proceedings of *quo warranto;* and this suggestion was filed and served as a declaration, in a personal action, and went on to issue, trial and judgment for the amount of fees and emoluments shown to have been received by the defendant, in the same manner as an ordinary suit at law.[2] But under the provisions of the Code, which, in most respects are substantially those of the statute, an action for the damages sustained by the plaintiff by the unlawful intrusion, is substituted for the proceeding by suggestion.[3] *

When judgment has been rendered upon the right of the person alleged to be entitled to such office, and in his favor, he then becomes entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it becomes his duty thereupon,

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[1] 3 Abb., 233.

[2] 2 R. S., 582, 583, §§ 31, 34, 38; 3 Abb., 233.

[3] Code, § 439.

* *Note.*

immediately to demand of the defendant in the action, all the books and papers in his custody or within his power, belonging to the office from which he shall have been excluded.[1]

The rendition of the judgment of ouster against the defendant and in favor of the plaintiff, operates, upon the instant, as an ouster of the usurping incumbent; and the party adjudged to be entitled to said office, upon taking the official oath, giving bonds, and doing whatever the law requires to entitle him to said office, becomes invested with the office, and entitle to demand and have the books, papers, &c., belonging thereto.[2] But such party can institute no proceedings to compel the delivery of such books and papers, until after a judgment of ouster has been rendered against the defendant, and in his favor, and he has made himself entitled to the possession of the same.[3]

The relator having been adjudged to be entitled to the office, must immediately proceed to qualify himself for the legal occupancy of the same; and it is the duty of the defendant to deliver up, on demand, all books and papers in his custody or within his power, belonging to such office, to the relator.[4] And such defendant, refusing or neglecting to deliver over such books and

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[1] Code, § 437.

[2] 7 How., 282; Code, § 437.

[3] 14 Barb., 396; 7 How., 173.

[4] Code, § 437; 2 R. S., 532, § 32; 2 N. Y. S. at L., 603.

papers, pursuant to the demand, is deemed guilty of a misdemeanor, and is subject to be proceeded against under the provisions of the statute entitled proceedings to compel the delivery of books and papers by public officers, to their successors.[1]

Where the defendant thus neglects to deliver over any books and papers as required, the party entitled to the possession of the same makes complaint thereof, upon oath, to any justice of the Supreme Court or first judge of the county where the defendant resides, and if the judge or officer be satisfied, by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he grants an order directing the defendant to show cause before him, within a short and reasonable time, why he should not be compelled to deliver the same.[2] Such complaint should state every essential particular necessary to show the party applying to be entitled to the order. A general allegation that a judgment had been rendered and duly perfected in an action in the nature of a *quo warranto*, brought by the people to try the right of an individual to an office on a certain day, without stating in what court the judgment was rendered, or whether under the direction of a

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[1] 1 R. S., 124 and 125, §§ 50–56; 1 N. Y. S. at L., 114.

[2] 1 R. S., 125, § 51.

single judge, or at general or special term, is not sufficient, especially if the allegations are denied.[1]

Where the relator proposes to proceed against an officer *de facto*, to compel the delivery of books and papers, &c., his title to the office should be unquestioned, if it has not been previously settled by adjudication. If his title to the office be not clear, his remedy is by action in the nature of a *quo warranto*,[2] and not by a proceeding under the statute.[3]

Where proceedings have been instituted under the statute to obtain the posession of the books and papers, &c., and the defendant has been ordered to show cause, the officer at the time appointed for that purpose, or to which such matter may be adjourned, must proceed to inquire into the circumstances. If the person thus charged appear and make affidavit before such officer, that he has truly delivered over to the relator all such books and papers in his custody or appertaining to his office within his knowledge, all further proceedings before such officer must cease, and the defendant be discharged.[4] But the defendant not making any such oath, and it appearing that such books and papers are withheld, the officer issues his warrant to commit

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[1] 14 Barb., 396.

[2] *In matter of Daniel S. Baker*, 11 How., 418.

[3] 1 R. S., 125, §§ 51, 52, 53.

[4] Idem, § 52.

the defendant to the jailuntil he deliver the books and papers, or be otherwise discharged.[1]

The officer may also issue his warrant, directed to any sheriff or constable, requiring him, in the day time, to search such places as he shall designate in such warrant, for such books and papers, and seize them and bring them before him,[2] who shall inquire into and examine whether the same belong to said office, and if he shall so find, he must cause the same to be delivered to the complainant.[3]

Action to vacate a patent.

The attorney-general may also bring an action in the name of the people of the State, for the purpose of of vacating or annulling letters patent granted by the people of this State, in the following cases: 1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion, or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or, 2. When he shall have reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or, 3. When he shall have reason to believe that the patentee, or those claiming under him, have done or

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[1] Idem, § 53.

[2] Idem, § 54.

[3] Idem, § 55.

omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.[1]

Upon the rendition of a judgment against a corporation, or for vacating or annulling of letters patent, it is the duty of the attorney-general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of State.[2] And when the record relates to letters patent, the secretary, thereupon, makes an entry in the records of the commissioners of the land office, of the substance and effect of such judgment, and of the time when the record thereof was docketed; and the real property granted by such letters patent may thereafter be disposed of by such commissioner, in the same manner as if such letters had never been issued.[3]

The Code of Civil Procedure does not affect the proceedings by information in the nature of quo warranto; the sections of the Code of Procedure (§§ 428 to 446), are left unrepealed by the general repealing act, Laws 1877, chap. 417. The action, however, is prosecuted in the manner prescribed by the new Code.

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[1] Code, § 433.
[2] Idem, § 445.
[3] Idem, § 446.

The action in the nature of quo warranto does not lie against the secretary of a railroad company, holding his position as a mere servant thereof and at the will of its directors.[1] Nor in favor of an individual either as corporator or tax-payer to determine the legality of the election of one claiming to hold a municipal office, or to restrain the exercise of unauthorized powers by the officers of a municipal corporation, or to restrain or avoid the illegal acts of the corporation, unless such individual is thereby affected in his private rights as distinct from that of other corporators and tax-payers.[2] Nor in favor of an individual to compel a municipal officer to cause an election to be held to fill a vacancy.[3] Nor where such individual claims to hold a municipal office to determine his rights thereto, where no other person has claimed such office and the defendant has not interfered with his legal rights as an officer.[4] So the section will not lie in the name of the people of the State for the redress of private wrongs. The people cannot intervene except a distinct right on the part of the public is alleged in respect to the subject matter litigated.[5] Nor will the action lie on the part of the people to recover from a wrong-doer either money or other property belonging to a

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[1] 1 Lansing, 202.
[2] 63 N. Y., 320.
[3] Id.
[4] Id.
[5] 57 N. Y., 161.

public corporation or for damages for a fraud committed upon such corporation, and especially against a wrongdoer who occupies no fiduciary or official relation to the corporation injured.[1] Though otherwise now by the recent act of the Legislature Laws of 1875, chap. 49, page 43.

An intruder into a public office can only be removed by the State; and its decision as to whether or not an action shall be brought for that purpose is final, and cannot be reviewed by the courts.[2]

The issue in an action to test the title to an office. If the action is brought by the attorney-general on behalf of the people, the issue is with the defendant to show that he has a legal title to the office; that his possession is a legal and rightful one.[3] Otherwise, however, where the action is brought on the relation of one claiming the office. Upon that issue the plaintiffs have the affirmative, and they must maintain it.[4]

The issues are legal and triable by jury. The action to try the title to a corporate office, to which there are several claimants, is one of legal, not equitable cognizance. The issues are strictly legal, and the trial thereof by a jury is the constitutional right of

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[1] 58 N. Y., 1; reversing, 13 Barb., 114. Abb. N. S. N. Y., 25.

[2] 8 Hun., 334, citing, 22

[3] 55 N. Y., 525.

[4] Ib., and see 1 Lansing, 309.

the parties.[1] And if, with such a cause of action, an equitable cause of action is united, both must be tried by a jury, unless a jury trial is waived.[2] But, in such action, where the complaint and the nature of the case call for equitable relief, the cause regularly comes on for trial by the court; and a demand for a jury made after the parties and witnesses are present, prepared for the trial, and plaintiff has opened the case, read the pleadings and rested, may be refused.[3]

An injunction is not an appropriate remedy in an action to remove a person from an office into which he has unlawfully intruded.[4]

Judgment of ouster against a corporation. To justify a judgment of ouster against a corporation for the forfeiture of a vested franchise, because of the breach of a condition subsequent, the verdict must show the fact, not merely of the breach of the letter of the subsequent condition, but of its intent and meaning, and must find such facts as the court may adjudge to amount to a substantial breach of the condition.[5]

Appointment of receiver. The judgment may direct the appointment of a receiver, although § 444 of the Code makes it the duty of the attorney-general, im-

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[1] 57 N. Y., 161; affirming same case, 5 Lansing, 251.

[2] Ib.

[3] 1 Lansing, 308.

[4] 5 Hun., 452.

[5] 47 N. Y., 586.

mediately after the rendition of the judgment, to institute proceedings for that purpose.[1]

Costs in the action. Proceedings in the nature of a quo warranto are a civil action, and the prevailing party is entitled to costs. Judgment for costs against the defendant is properly entered where judgment ousting him from the office although the judgment also determines that the relator is not entitled to the office.[2] Costs adjudged to the people in actions prosecuted or defended by the attorney-general may be applied by him to any of the purposes for which appropriations are made for his office.[3]

Amendment of § 434 *of the Code.* Where an action shall be brought by the attorney-general on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff, and in every such case the attorney-general may require as a condition for bringing such action, that satisfactory security shall be given to indemnify the people of this State against the costs and expenses to be incurred thereby; and in every case where such security is given the measure of the compensation to be paid by such person or persons to the attorney-general, shall be left to the agreement of the parties express or implied.[4]

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[1] 53 Barb., 98; affirmed, 42 N. Y., 217.

[2] 52 N. Y., 576.

[3] Laws 1874, page 499; 1875, page 420.

[4] Laws 1867, page 1926.

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